

Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Ines Fernandez Ortega, Lorenzo Fernandez Ortega, Ocotlan Fernandez Ortega, Maria Lidia Ortega, Fortunato Prisciliano Sierra, Noemi, Ana Luz, Colosio, Nelida and Neftali Prisciliano Fernandez v. Mexico
Doc. Type:	Judgement (Preliminary Objections, Merits, Reparations, and Costs)
Decided by:	President: Diego Garcia Sayan; Vice President: Leonardo A. Franco; Judges: Manuel E. Ventura Robles; Margarette May Macaulay; Rhadys Abreu Blondet; Alberto Perez Perez; Eduardo Vio Grossi; Alejandro Carlos Espinosa
Dated:	30 August 2010
Citation:	Fernandez Ortega v. Mexico, Judgement (IACtHR, 30 Aug. 2010)
Represented by:	APPLICANTS: the Organization of Tlapaneco/Me'phaa Indigenous People, the Center for Human Rights of the Tlachinollan Mountain A.C., and the Center for Justice and International Law
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In the case of Fernández Ortega et al.,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also “the Convention” or “the American Convention”) and Articles 30, 38(6), 56(2), 58, 59, and 61 of the Rules of Procedure of the Court [FN1] (hereinafter “the Rules of Procedure”), delivers this Judgment.

[FN1] As stipulated in Article 79(1) of the Court’s Rules of Procedure that entered into force on June 1, 2010, “[c]ontentious cases submitted to the consideration of the Court before January 1, 2010, will continue to be processed in accordance with the preceding Rules of Procedure until the delivery of a judgment.” Consequently, the Court’s Rules of Procedure mentioned in this judgment correspond to the instrument approved by the Court at its forty-ninth regular session, held from November 16 to 25, 2000, partially amended at its eighty-second regular session held from January 19 to 31, 2009.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On May 7, 2009, in accordance with the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court an application against the United

Mexican States (hereinafter “the State” or “Mexico”), which originated from the petition filed on June 14, 2004, by Inés Fernández Ortega (hereinafter, “Mrs. Fernández Ortega” or “the alleged victim”), the Organización Indígena de Pueblos Tlapanecos A.C. [the Indigenous Organization of the Tlapanec People] and the Centro de Derechos Humanos de la Montaña ‘Tlachinollan’ A.C. [Tlachinollan Human Rights Center of the Mountain] (hereinafter also “Tlachinollan”). On October 21, 2006, the Inter-American Commission issued Admissibility Report No. 94/06 [FN2] and, on October 30, 2008, it approved Report on Merits No. 89/08, pursuant to Article 50 of the Convention, in which it made a series of recommendations to the State. [FN3] The aforementioned report was notified to Mexico on November 7, 2008, and the State was granted two months to provide information on any actions taken to implement the recommendations. On December 12, 2008, the State presented a preliminary report and requested an extension of the time limit to comply with the recommendations indicated. On February 5, 2009, the Commission advised the State that it had been granted a three-month extension. On April 20, 2009, Mexico presented a final report on the state of compliance with the recommendations. The Inter-American Commission submitted the case to the Court, “[h]aving considered the information provided by the parties concerning the implementation of the recommendations contained in the [M]erits [R]eport, and taking into account the absence of substantive progress in effective compliance with them.” The Commission appointed Florentín Meléndez, Commissioner at the time, and its Executive Secretary, Santiago A. Canton, as delegates, and as legal advisors, the Deputy Executive Secretary, Elizabeth Abi-Mershed, and the lawyers, Isabel Madariaga, Juan Pablo Albán Alencastro, Rosa Celorio and Fiorella Melzi, Secretariat specialists.

[FN2] In Admissibility Report No. 94/06, the Commission declared petition No. 540/04 admissible with regard to the alleged violation of Articles 5(1), 7, 8(1), 11, 17, 19, 21 and 25, in relation to Article 1(1), all of the American Convention; as well as to Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (file of annexes to the application, appendix 2, folio 730).

[FN3] In Report on Merits No. 89/08, the Commission concluded that the State was “responsible for violating the rights to judicial guarantees and to judicial protection embodied in Articles 8(1) and 25 of the American Convention in relation to Article 1(1) thereof, and Articles 5(1) and 11 of the American Convention, in relation to Article 1(1) of this international instrument. Furthermore, it conclude[d] that the State [was] responsible for the violation of Article 7 of the Inter-American Convention [on the Prevention, Punishment and Eradication of Violence against Women] and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of [Mrs.] Fernández Ortega. Regarding the next of kin, it conclude[d] that the State [was] responsible for violating Article 5(1) of the American Convention, in relation to the general obligation to respect and ensure rights established in Article 1(1) of this international instrument” (file of annexes to the application, annex 1, folio 720).

2. According to the Inter-American Commission, the application refers to the alleged international responsibility of the State for the “rape and torture” of Inés Fernández Ortega that took place on March 22, 2002; the “lack of due diligence in the investigation and punishment of the authors” of these facts; “the failure to make adequate reparation to the [alleged] victim and

her next of kin; [...] the use of the military justice system to investigate and prosecute human rights violations, and [...] the difficulties encountered by indigenous people, indigenous women in particular, to obtain access to justice.”

3. Based on the above, the Inter-American Commission asked the Court to declare the State responsible for the violation of Articles 5 (Right to Humane Treatment [Personal Integrity]), 8 (Right to a Fair Trial [Judicial Guarantees]) and 25 (Right to Judicial Protection) of the American Convention, in relation to the general obligation to respect and ensure human rights established in Article 1(1) thereof, to the detriment of Mrs. Fernández Ortega and the following next of kin: Fortunato Prisciliano Sierra (husband), Noemí, Ana Luz, Colosio, Nélica and Neftalí Prisciliano Fernández (children), María Lída Ortega (mother), and Lorenzo and Ocotlan Fernández Ortega (brothers). In addition, it indicated that Mexico is responsible for the violation of Article 11 (Right to Privacy [Honor and Dignity]) of the American Convention, in relation to the general obligation to respect and ensure human rights established in Article 1(1) thereof, and of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter also “the Convention of Belém do Pará”), to the detriment of Mrs. Fernández Ortega. Lastly, it considered that the State had failed to comply with its obligations under Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter also “the Convention Against Torture”). Based on the above, the Inter-American Commission asked the Court to order the State to make certain reparations.

4. On August 18, 2009, the Organización del Pueblo Indígena Tlapaneco/Me’phaa [FN4], [Organization of Tlapaneco/Me’phaa Indigenous People], the Centro de Derechos Humanos de la Montaña “Tlachinollan” A.C., [Center for Human Rights of the Tlachinollan Mountain A.C. (Tlachinollan)], and the Center for Justice and International Law (CEJIL) (hereinafter “the representatives”), forwarded their brief with pleadings, motions and evidence (hereinafter “brief of pleadings and motions”), in accordance with Article 24 of the Rules of Procedure. The representatives concurred, substantially, with the violations alleged by the Inter-American Commission but added the alleged failure to comply with the obligation to adopt domestic legislative measures (Article 2 of the Convention), as well as the alleged violation of the rights to freedom of association and to equal protection of the law (Articles 16 and 24 of the Convention, respectively). Lastly, they asked that the Court order the State to adopt various measures of reparation, as well as certain costs and expenses.

[FN4] The parties use the terms me’paa or me’phaa alternatively to refer to the community or the language of Mrs. Fernández Ortega. The Court observes that there are distinct linguistic variants of Tlapaneco that in Spanish are written in distinct ways depending on the geographical location of the community in question. According to the Instituto Nacional de Lenguas Indígenas del Estado [National Institute of Indigenous Languages of the State], the variant which corresponds to Barranca Tecoani is “me’paa” (http://www.inali.gob.mx/clin-inali/html/v_tlapaneco.html#4). Nevertheless, the Court uses the two abovementioned forms in an indistinct manner, in conformity with that used by the parties throughout the case at hand.

5. On December 13, 2009, the State presented a brief in which it filed a preliminary objection, answered the application, and made observations on the brief of pleadings and motions (hereinafter “response to the application”). Mexico asked the Court to consider the preliminary objection as founded and to declare its “lack of jurisdiction *ratione materiae*” to determine violations of the Convention of Belém do Pará. It also asked the Court to declare the inexistence of the violations of the rights established by the American Convention or other inter-american instrument alleged by the Commission and the representatives, and as a consequence, that the claims regarding reparations be rejected. The state designated Zadalinda González and Reynero as Agent.

6. On March 3, 2010, the Commission and the representatives presented their arguments on the preliminary objection filed by the State, in accordance with Article 38(4) of the Rules of Procedure.

II. PROCEEDINGS BEFORE THE COURT

7. The Commission’s application was notified to the representatives and to the State on June 18 and 19, 2009, respectively. [FN5] During the proceedings before this Court, in addition to the presentation of the principal briefs (*supra* paras. 1, 4, and 5), and others sent by the parties, in an order of March 12, 2010, the President of the Court (hereinafter “the President”) required that the testimony of three alleged victims and four witnesses proposed by the Commission and by the representatives, as well as the expert reports of five expert witnesses proposed by the Commission and by the representatives, be received by means of statements made before public notary (hereinafter also affidavit). The parties were able to submit observations on these documents. Furthermore, the President convened the Commission, the representatives, and the State to a public hearing to hear the expert opinions of three expert witnesses proposed by the Commission and the representatives, together with the final oral arguments of the parties on the preliminary objection and the merits, reparations, and costs. [FN6]

[FN5] On July 30, 2009, following an extension granted by the Court, the State appointed Alejandro Carlos Espinosa as Judge Ad hoc.

[FN6] Cf. Fernández Ortega et al. v. Mexico. Summons to a public hearing. Order of the President of the Inter-American Court of Human Rights of March 12, 2010, First, Fourth and Tenth Operative Paragraphs.

8. The public hearing was held on April 15, 2010, during the Court’s XLI Extraordinary Period of Sessions, held in Lima, Peru. [FN7]

[FN7] At this hearing, there appeared: a) for the Inter-American Commission: Rodrigo Escobar Gil, Commissioner, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Lilly Ching, Fiorella Melzi and Federico Guzmán, legal advisers; b) for the representatives: Abel Barrera Hernández, Vidulfo Rosales Sierra, Alejandro Ramos Gallegos and Jorge Santiago Aguirre Espinosa (Tlachinollan lawyers), and Gisela De León and Agustín Martín (CEJIL lawyers), and

c) for the State: Juan Manuel Gómez Robledo, Assistant Secretary for Multilateral Affairs and Human Rights of the Secretariat for Foreign Affairs; Alejandro Negrín Muñoz, Director General of Human Rights and Democracy of the Secretariat for Foreign Affairs; Rogelio Rodríguez Correa, Deputy Director for International Affairs of the Directorate General of Human Rights of the National Defense Secretariat; Yéssica de Lamadrid Téllez, Director General for International Cooperation of the Office of the Attorney General of the Republic; Carlos Garduño Salinas, Deputy Director General of the Unit for the Promotion and Defense of Human Rights of the Secretariat of the Interior; Jorge Cicero Fernández, Head of Chancery of Mexico in Peru; Rosa María Gómez Saavedra, Secretary for Women's Affairs of the state of Guerrero; María de la Luz Reyes Ríos, Director General of the Ombudsman Service of the General Secretariat of the government of the state of Guerrero; José Ignacio Martín del Campo Covarrubias, Director of International Litigation on matters relating to human rights of the Secretariat for Foreign Affairs; Luis Manuel Jardón Piña, Head of the Litigation Department of the Legal Office of Chancellery; Katya Vera, Head of International Litigation on matters relating to human rights of the Secretariat for Foreign Affairs, and Guadalupe Salas y Villagomez, Deputy Director General for Policy of the Office of the Special Prosecutor for Crimes of Violence against Women and Human Trafficking.

9. In addition, the Court received eight amicus curiae briefs from the following persons and institutions: i) three students of the Graduate Studies Department of the Law School of the Universidad Autónoma de México (UNAM), concerning the right of access to justice of the indigenous population in the state of Guerrero and the military criminal jurisdiction; [FN8] ii) the Public Interest Clinic of the Centro de Investigación y Docencia Económicas de la Ciudad de México and Women's Link Worldwide of Bogotá, Colombia, concerning international jurisprudence on sexual violence as a form of torture, and integral reparation of the damage to rape victims; [FN9] iii) the Argentine Forensic Anthropology Team (EAAF), on the scientific procedures and on the attention provided to women rape victims by State bodies, in relation to the present case; [FN10] iv) the Center for Human Rights Studies of the Law School of the Universidad de San Martín de Porres, concerning the State's obligation to adopt special measures for vulnerable individuals, rape as torture, and the alleged victim's right of access to justice; [FN11] v) Fundar, Centro de Análisis e Investigación A.C., which submitted two briefs, one on the indigenous rights recognized by the State and the other on the alleged inexistence of remedies against the rejection of the jurisdiction of ordinary justice in favor of the military justice system; [FN12] vi) the Miguel Agustín Pro Juárez A.C. Human Rights Center concerning, inter alia, the relevance of the alleged context of serious human rights violations in which the facts of the case occurred from the point of view of its juridical analysis and for establishing reparations, [FN13] and vii) a law professor and students of the Strategic Litigation and Human Rights course of the Instituto Tecnológico Autónomo de México, concerning access to justice in the case of indigenous women, the obligation to investigate, and the military criminal jurisdiction. [FN14] These briefs were duly forwarded to the parties so that they could make any observations they deemed pertinent.

[FN8] The original brief was received by the Secretariat of the Court on April 30, 2010, and is signed by Miguel Ángel Antemate Mendoza, Julio César Hernández Salmorán and Carlos Alejandro Martiarena Leonar. A copy of the brief was received on April 28, 2010.

[FN9] The original brief was received by the Secretariat of the Court on May 6, 2010, and is signed by Gail Aguilar Castañón, Javier Cruz Angulo Nobara, Alejandro Madrazo Lajous, Anel Alejandra Valadez Murillo and Víctor Daniel Gutiérrez Muñoz, lawyer, Director, Coordinator of the Area of Sexual and Reproductive Rights, and members, respectively, of the Public Interest Clinic, as well as Katherine Romero and Andrea Parra, lawyer for Latin America, and lawyer, Coordinator of the Gender and Justice Observatory of Women's Link Worldwide, respectively. A copy of the brief was received on April 30, 2010.

[FN10] The original brief was received by the Secretariat of the Court on May 6, 2010, and is signed by Ana Lorena Delgado Pérez, Mercedes Doretti and Sofía Egaña, Legal Consultant and members, respectively, of the Argentine Forensic Anthropology Team. A copy of the brief was received on April 30, 2010.

[FN11] The brief was received by the Secretariat of the Court on April 30, 2010, and is signed by Miguel Ángel Soria Fuerte, Professor of the Human Rights Studies Center of the Law School, Universidad de San Martín de Porres.

[FN12] The original briefs were received by the Secretariat of the Court on May 6, 2010, and are signed by Miguel A. Pulido Jiménez, Executive Director of Fundar, Centro de Análisis e Investigación, A.C. The copies of these briefs were received on April 30, 2010.

[FN13] The original brief was received by the Secretariat of the Court on May 4, 2010, and is signed by Luis Arriaga Valenzuela and Stephanie Erin Brewer, Director and member, respectively, of the International Area of the Miguel Agustín Pro Juárez Human Rights Center. A copy of the brief was received on April 30, 2010.

[FN14] The original brief was received by the Secretariat of the Court on May 6, 2010, and is signed by: Fabián Sánchez Matus, Rodrigo Casas Farías, Miguel Ángel Navarrete Barba, Tania Gabriela Casso López Lavalle, Fernando Ojeda Maldonado, Mariana Castañeda Graham, Leopoldo Ortega Ortuño, Priscila Cruces Aguilar, Jonathan Ortiz Campos, Ximena De Iturbide Rangel, Mónica Patricia Pérez Ankarvall, Erika Marcela Estrever Aviña, Héctor Iván Resendiz Herrera, Elías Gallardo Palma, Fabiola Rojo Durand, Edna Teresa Guzmán García, Hugo Tomás Ruelas Gutiérrez, Daniela Hernández Chong Cuy, Paola María Sistach Díaz Chávez, Karla Jordana Hernández Ruiz, Mariana Taladrid Hernández, Alberto Limón-Lason González, María José Villalvazo González and Walter Westphal Oberschmidt, professor and students, respectively of the Strategic Litigation and Human Rights course of the Instituto Tecnológico Autónomo de México (ITAM). A copy of this brief was received on May 1, 2010.

10. On May 24, 2010, the Inter-American Commission, the representatives, and the State forwarded their final written arguments, which were transmitted to the parties in order for them to make the observations deemed pertinent regarding the specific documents sent by Mexico and the representatives with the briefs.

III. PRELIMINARY OBJECTION

11. In its response to the application, the State filed the objection of “[l]ack of jurisdiction of the Inter-American Court [...] to examine violations of the Inter-American Convention on the

Prevention, Punishment, and Eradication of Violence against Women.” Subsequently, at the public hearing, the State “withdr[ew] the preliminary objection invoked in the response to the application.” In its final written arguments, it ratified this withdrawal and clarified that “this does not mean that the State acknowledges violations of the Convention” in the present case; to the contrary, it affirmed that there had been no violations of this international instrument.

12. The Commission and the representatives requested the Court to reject the preliminary objection filed by Mexico and affirmed the subject-matter jurisdiction of the Inter-American Court to rule on the alleged violations of Article 7 of the Convention of Belém do Pará.

13. The Court takes notes of the withdrawal of the preliminary objection initially filed by the State in relation to its subject-matter jurisdiction with regard to Article 7 of the Convention of Belém do Pará, a matter decided prior to the present case. [FN15] Furthermore, it accepts this withdrawal in the terms expressed by Mexico and, consequently, will analyze the alleged violations of said treaty in the corresponding chapters of this Judgment.

[FN15] Cf. *González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, paras. 31 to 77.

IV. JURISDICTION

14. The Inter-American Court has jurisdiction to hear this case under Article 62(3) of the Convention, because Mexico has been a State Party to the American Convention since March 24, 1981, and accepted the contentious jurisdiction of the Court on December 16, 1998. In addition, the State ratified the Inter-American Convention to Prevent and Punish Torture on June 22, 1987, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women on November 12, 1998.

V. PROVISIONAL MEASURES

15. On April 7, 2009, the Inter-American Commission, in the framework of the case being processed before it, asked the Court to order the State to adopt provisional measures in favor of the alleged victims and of other persons who were directly or indirectly connected to the present case. On April 9, 2009, the President of the Court at the time, issued an Order for urgent measures calling on the State to adopt the necessary measures to protect the life and personal integrity of the alleged victims and others. [FN16] The Court ratified this order on April 30, 2009. [FN17] The provisional measures ordered by the Court remain in force at the time this Judgment is delivered and its issuance does not affect the continuity of the aforesaid measures.

[FN16] Cf. *Matter of Fernández Ortega et al.* Provisional measures with regard to Mexico. Order of the President of the Inter-American Court of Human Rights of April 9, 2009.

[FN17] Cf. *Matter of Fernández Ortega et al.* Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of April 30, 2009.

VI. PARTIAL ACKNOWLEDGEMENT OF INTERNATIONAL RESPONSIBILITY

16. During the public hearing, Mexico made a partial acknowledgement of its international responsibility in the following terms:

The Mexican State acknowledges before the Court: first, that the absence of specialized medical care for Mrs. Fernández Ortega, which should have included the psychological and not merely the physical aspect, and which should have been provided immediately, constitutes a flagrant violation of Article 8(1) of the American Convention. Second, that the destruction of the scientific evidence taken from the victim also constituted a flagrant violation Article 8(1) of the American Convention. Third, that despite the efforts made by the authorities, there have been delays and absence of due diligence in the investigations; therefore, there have been different violations of Articles 8(1) and 25 of the American Convention and, consequently, also of Article 5(1) thereof, with regard to the mental integrity of Mrs. Fernández Ortega. This is [...] the State's acknowledgement of international responsibility for violations of the American Convention [...] that it has come here to present today [...] so that the Court may order the reparations required by international law and by its jurisprudence.

17. Notwithstanding the acknowledgement of international responsibility, the State asked the Court to assess and rule, "in the context of its examination of Articles 5(1), 8(1) and 25 of the Convention," on the following aspects: i) the scrupulous respect for the alleged victim's procedural guarantees; ii) the interventions with a gender perspective carried out during the investigations; iii) the victim's repeated failure to assist in the investigations; iv) the actions of the authorities within the legal framework in force, and v) the State's promotion, at a procedural level, of the investigation. In addition, in the public hearing, Mexico indicated that it would not submit "any arguments concerning the use of the military justice system in relation to jurisdictional competences in this case, because the Court has already made a final ruling" in this regard. Lastly, it asked the Court to reject that, "in the present case, there have been violations of Articles 5(1), 11 and 16 of the Convention or of any other Inter-American legal instrument."

18. In its final written arguments, the State reiterated, inter alia, its acknowledgement of international responsibility regarding "the delay in the provision of medical care for Ms. Fernández Ortega, the loss of the gynecological samples taken from the alleged victim due to lack of care in the chain of custody, and finally, the delay in the investigation into the facts of the case, [all of which] constitute omissions that can be attributed to the Mexican State and that entail violations of Articles 8(1) and 25 of the American Convention on Human Rights, in connection with Article 5(1) of that instrument." México stated that:

Absence of timely medical care

The Mexican State acknowledges before [the] Court the delay of the ministerial authorities to provide Mrs. Fernández Ortega with medical care immediately after the criminal complaint had been filed on March 24, 2002[.] This delay of two days, and the absence of specialized medical personnel in the offices of the Public Prosecutor of Ayutla de los Libres, is a circumstance that,

although derived from the lack of human resources at that time [...] and progressively remedied by the state of Guerrero, is fully acknowledged by the Mexican State. [...]

Mexico acknowledges that, at the start of the investigations, [...] in 2002, the ministerial authority was the common jurisdiction and, even though it acted in accordance with the law, it was unable to provide timely medical and psychological care to Mrs. [...] Fernández Ortega by specialized female personnel immediately after the criminal complaint was filed.

Destruction of the gynecological evidence

The Mexican State acknowledges before [the] Court the destruction of the gynecological evidence based on the lack of diligence in its handling[.] The improper technical handling of the evidence by the technicians responsible for it, added to the absence of its chain of custody, resulted in its destruction [...]. This involuntary error, resulting from the lack of technical capacity and skill of the personnel of the local office of the Attorney General, as well as the implications of this fact on the subsequent development of the investigations, are circumstances fully acknowledged by the State – even since 2003, the year in which the National Human Rights Commission ruled on the loss of this evidence.

[...]

The State of Mexico acknowledges the lack of skill that resulted in the loss of the evidence, as well as the consequences of this omission on the development of the investigations.

Delay in the investigations

[T]he Mexican State acknowledges [that] in the present case, there has been a delay in the development of the investigation. Indeed, the investigations have taken eight years, without the authorities having been able to reach definitive conclusions on the commission and probable perpetrators. [The State underscored the complexity of the case, the failure of Mrs. Fernández Ortega to appear when summoned and that, recently in 2009, the alleged victim came forward for] the procedure of the artist's sketch and the album of photographs of the alleged authors. [Despite this, Mexico clarified that] it is in no way trying to transfer the responsibility for investigating and determining responsibilities to the alleged victim. This is of the State's unavoidable responsibility; however, it must be contextualized by the Court in light of the facts of the case.

19. The Commission “assesse[d] the partial acknowledgement of international responsibility made by Mexico [...] and consider[ed] that it is a positive step towards compliance [with] its international obligations.” Nevertheless, it observed “that several of the arguments submitted by the State [...] contradict the facts supposedly acknowledged” and “that, owing to the terms of said acknowledgement, the State has not fully assumed the legal implications in relation to the facts, or the pertinence of the reparations requested by the parties.” Consequently, it considered necessary that the Court “decide, in a Judgment, the matters that remain in dispute; namely, the facts directly or indirectly refuted by the State, the assessment, and juridical consequences of both the facts effectively acknowledged as well as those proven by the evidence provided by the parties during the proceedings, and the reparations that are found to be pertinent.”

20. The representatives indicated that, “the acknowledgement of responsibility concerning the violation of Articles 5, 8, and 25 of the American Convention does not cover, expressly, [...] the submitting of the criminal investigation of the rape of the victim – and the subsequent execution of procedures – to the military jurisdiction, even though the Mexican State itself recognizes that it has recently been sentenced and convicted for the use of this jurisdiction in the

investigation and prosecution of human rights violations.” The situation is particularly serious, when it is considered that the investigation has remained in the military jurisdiction even after the Court notified its Judgment in the case of Radilla Pacheco in which it found said practice to be incompatible with the American Convention. This “reveals the contradiction in the acknowledgement of responsibility, as well as the absence of real willingness to assume the international obligations.” In addition, despite acknowledging the delay and absence of due diligence in the investigations, the State alleged that this situation “was the result of the lack of cooperation of [the alleged victim] because, according to the State’s representative, she had not come forward to testify in order to identify her attackers, even though the authorities had summoned her on numerous occasions.” Hence, the acknowledgement of international responsibility is “unclear, ambiguous and contradictory[,] does not reveal the existence of the State’s willingness to comply with its international obligations,” and is limited to “two specific omissions in the investigation, and a general acknowledgement of delay made while insisting in transferring part of the responsibility for this to the victim.”

21. Under the provisions of Articles 56(2) and 58 of the Rules of Procedure, in the exercise of its powers of international judicial protection of human rights, the Court can decide whether an acknowledgement of international responsibility made by a defendant State offers sufficient grounds, in the terms of the American Convention, to continue examining the merits and determining possible reparations and costs. [FN18]

[FN18] Cf. *Myrna Mack Chang v. Guatemala. Merits, Reparations, and Costs. Judgment of November 25, 2003. Series C No. 101, para. 105; Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 17, and Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 26, 2010. Series C No. 213, para. 17.*

22. Given that the proceedings before this Court refer to the protection of human rights, a matter of international public order that transcends the intentions of the parties, the Court must ensure that acts of acquiescence are acceptable for the purposes of the Inter-American system. In this task, the Court does not merely verify the formal conditions, but must relate them to the nature and severity of the alleged violations, the requirements and interest of justice, the particular circumstances of the case, and the attitude and position of the parties, [FN19] which are analyzed in each specific case.

[FN19] Cf. *Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008. Series C No. 177, para. 24; Case of Chitay Nech et al, supra note 18, para. 18, and Case of Manuel Cepeda Vargas, supra note 18, para. 17.*

23. Regarding the facts, the Court observes that the State partially acknowledged its international responsibility in a sufficiently clear and specific manner in relation to the delay in the provision of medical and psychological care to Mrs. Fernández Ortega, the destruction of the

scientific evidence taken from the alleged victim, and the delay and lack of due diligence in the investigation of the case. Based on those facts, Mexico acknowledged its international responsibility for the violations of the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25 of the American Convention, as well as the right to personal integrity established in Article 5 thereof – the latter only with regard to the psychological harm caused to the detriment of Mrs. Fernández Ortega. Finally, with regard to the claims concerning reparations, based on its acknowledgement of responsibility, the State indicated that the Court should order those measures that accorded with international law and its jurisprudence.

24. The Inter-American Court decides to accept the State’s acknowledgement of international responsibility and classify it as a partial admission of the facts and a partial acquiescence to the legal claims in the Commission’s application and in the brief of pleadings and motions of the representatives. Regarding possible reparations, the Court will examine these and take the pertinent decisions in Chapter XI of this Judgment.

25. The Inter-American Court assesses the acknowledgement made by Mexico and considers that it makes a positive contribution to the development of these proceedings, to the exercise of the principles that inspire the American Convention and to the conduct that the States are obliged to adopt in this matter, owing to the commitments made as parties to international human rights instruments. [FN20]

[FN20] Cf. Case of Trujillo Oroza v. Bolivia. Merits. Judgment of January 26, 2000. Series C No. 64, para. 42; Case of Gonzalez et. al. (“Cotton Fields”), supra note 15, para. 26, and Case of the Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 24, 2009. Series C No. 211, para. 38.

26. Lastly, the Court observes that the dispute between the parties remains with regard to the facts and claims relating to the alleged violations of the rights to personal integrity, judicial guarantees, honor and dignity, freedom of association, equality before the law, and judicial protection, established in Articles 5, 8, 11, 16, 24, and 25 of the American Convention, respectively, in relation to the general obligation to respect and ensure rights established in its Article 1(1); the obligation to adopt domestic legislative measures established in Article 2 of this international instrument, as well as those obligations arising from Articles 1, 6, and 8 of the Convention Against Torture and Article 7 of the Convention of Belém do Pará. Based on the above, the Court finds it necessary to deliver a Judgment in which it determines the facts and all aspects of the merits of the matter, as well as their possible consequences on reparations.

VII. EVIDENCE

27. Based on the provisions of Articles 46, 47, 49, and 50 of the Court’s Rules of Procedure, as well as in its jurisprudence regarding evidence and its assessment, [FN21] the Court will examine and assess the documentary evidence submitted by the parties in the various procedural opportunities, as well as the statements, the testimony, and the opinions provided by affidavit

and during the public hearing. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding normative framework. [FN22]

[FN21] Cf. The “White Van” (Paniagua Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 50; Case of Chitay Nech et al, supra note 18, para. 47, and Case of Manuel Cepeda Vargas , supra note 18, para. 53.

[FN22] Cf. The “White Van” (Paniagua Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of Chitay Nech et al, supra note 18, para. 47, and Case of Manuel Cepeda Vargas, supra note 18, para. 53.

A. Documentary, testimonial, and expert evidence

28. The Court received the statements made before the public notary by the following alleged victims, witnesses, and expert witnesses: [FN23]

1. Inés Fernández Ortega, [FN24] alleged victim, proposed by the Inter-American Commission and the representatives. She testified about: i) the incident that occurred on March 22, 2002; ii) the measures taken to clarify the historical truth of the facts and to identify, prosecute, and punish those responsible; iii) the authorities’ attitude and response to these measures; iv) the alleged obstacles faced when trying to obtain justice; v) the alleged threats and acts of harassment against her, her family, and her representatives, because of the search to obtain justice, and vi) the consequences for her personal life and for her family of the alleged human rights violations in this case.

2. Noemí Prisciliano Fernández, Mrs. Fernández Ortega’s daughter, alleged victim, proposed by the Inter-American Commission and the representatives. She testified about: i) the incident that occurred on March 22, 2002; ii) the measures taken to clarify the historical truth of the facts and to identify, prosecute, and punish those responsible; iii) the authorities’ attitude and response to these measures; iv) the alleged obstacles faced in trying to obtain justice; v) the alleged threats and acts of harassment against her family because of the search to obtain justice in this case, and vi) the consequences for her personal life and for her family of the alleged human rights violations in this case.

3. Fortunato Prisciliano Sierra, Mrs. Fernández Ortega’s husband, alleged victim, proposed by the representatives. He testified about: i) the search to obtain justice for the alleged rape of his wife; ii) the alleged threats and acts of harassment against his family and himself because of the search for justice, and iii) the way in which he and his family have been affected by the alleged violations committed in this case.

4. Otilia Eugenio Manuel, [FN25] member of the Organización del Pueblo Indígena Tlapaneco [Organization of the Tlapaneco Indigenous People], witness proposed by the Inter-American Commission. She testified about: i) the measures taken to clarify what happened to Mrs. Fernández Ortega, and to ensure the identification, prosecution and punishment of those responsible; ii) the authorities’ attitude and response to these measures; iii) the alleged obstacles faced in the search to obtain justice, and iv) the alleged threats and acts of harassment related to the search for justice in this case.

5. Cuauhtémoc Ramírez Rodríguez, member of the board of the Organización del Pueblo Indígena Tlapaneco [Organization of the Tlapaneco Indigenous People], witness proposed by the representatives. He testified about: i) the circumstances surrounding the alleged rape of which Mrs. Fernández Ortega was presumably a victim; ii) the alleged use of rape as a form of harassment practiced by the Army against the social movements in Guerrero; iii) the supposed effects that Mrs. Fernández Ortega's alleged rape had on the work of the Organización del Pueblo Indígena Tlapaneco/Me'phaa, [Organization of the Tlapaneco/Me'phaa Indigenous People], and iv) the alleged threats and harassment against those involved in the search to obtain justice in the case of Mrs. Fernández Ortega.

6. Hipólito Lugo Cortés, Inspector General of the Commission for the Defense of Human Rights of Guerrero, witness proposed by the representatives. He testified about: i) the investigation conducted by the Commission for the Defense of Human Rights of Guerrero, and ii) the way Mrs. Fernández Ortega was treated by the authorities when she approached them to obtain justice.

7. María Isabel Camila Gutiérrez Moreno, editor and correspondent of the newspaper, El Sur, witness proposed by the representatives. She testified about: i) the alleged context of militarization in the indigenous areas, in particular Ayutla, state of Guerrero, and ii) the documentation, newspaper articles and investigations that, as a journalist, she had prepared in the context of the alleged rape of Mrs. Fernández Ortega and other indigenous women in the area of Ayutla.

8. Rodolfo Stavenhagen, anthropologist and sociologist, former United Nations Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, expert witness proposed by the Inter-American Commission. He provided an expert opinion on: i) the situation of the indigenous population in the state of Guerrero; ii) the conduct of the Mexican Armed Forces towards the indigenous population, and iii) the effects on the Mexican indigenous peoples of the alleged limitations to their access to justice, and the alleged impunity for human rights violations.

9. Jan Perlin, lawyer, former Director of the Diagnostic Project on Access to Justice for Indigenous Peoples in Mexico of the Office of the High Commissioner for Human Rights of the United Nations, expert witness proposed by the Inter-American Commission. She provided an expert report on: i) the situation of access to justice of the indigenous peoples in Mexico, and ii) the improvements that should be adopted on the matter.

10. Paloma Bonfil Sánchez, ethno-historian, researcher and consultant on gender and indigenous women, expert witness proposed by the Inter-American Commission. She provided an opinion on the alleged discrimination against indigenous women in Mexico.

11. Federico Andreu Guzmán, lawyer, General Counsel for the International Commission of Jurists, expert witness proposed by the Inter-American Commission. He provided an opinion on the use of the military justice system to investigate and prosecute offenses that are not service-related and, in particular, violations of human rights.

12. Miguel Carbonell Sánchez, lawyer, expert in Mexican constitutional law, researcher and coordinator of the Academic Extension Unit and Editorial Projects of the Institute of Legal Research of the Universidad Autónoma de México (UNAM), expert witness proposed by the representatives. He provided an opinion on: i) the use of the military jurisdiction in Mexico with regard to violations of human rights and the measures that the State should adopt to avoid the recurrence of this alleged practice, and ii) the measures needed to ensure that the victims of

human rights violations have access to an effective remedy to obtain legal protection when the military criminal justice system exercises jurisdiction in their case.

[FN23] The Inter-American Commission desisted from the testimony of a member of Amnesty International and the representatives waived the expert opinion of Alda Facio Montejo, which was admitted by the President of the Court. On its behalf, Mexico did not propose witnesses nor experts. Cf. *Fernández Ortega et al. v. Mexico*. Summons to a public hearing, supra note 6, Considering clauses 22 and 28.

[FN24] After submitting its final list of deponents witnesses and expert witnesses, the Inter-American Commission advised that Mrs. Fernández Ortega was “at an advanced stage of pregnancy, and therefore c[ould] not assist to testify at the public hearing.” The representatives specified that the alleged victim was scheduled to give birth around the date of the public hearing” and, since she was unable to attend the hearing, they asked whether her statement could be made before a public notary and not at the public hearing. The State did not establish “any objection to Mrs. Fernández Ortega presenting her testimony by affidavit.” The President admitted the request that Mrs. Fernández Ortega provide her testimony by affidavit. Cf. *Case of Fernández Ortega et al. v. Mexico*. Summons to a public hearing, supra note 6, Considering clauses 10 to 12 and 14. At the start of the hearing and with the State’s consent, the Court was shown a video in which Mrs. Fernández Ortega addressed the Court, asking the authorities to hear and reach a decision regarding her complaint.

[FN25] After submitting its final list, the Inter-American Commission requested “the substitution of the testimony of Mrs. Fernández Ortega for that of Mrs. [...] Eugenio Manuel,” to be heard during the public hearing, owing to the former’s advanced state of pregnancy. The President deemed it pertinent not to admit this request. Cf. *Case of Fernández Ortega et al. v. Mexico*. Summons to a public hearing, supra note 6, Considering clauses 17 and 18. In addition, on March 25, 2010, the Inter-American Commission requested reconsideration of the President’s decision and the Court ratified the Order of the President of March 12, 2010. Cf. *Case of Fernández Ortega et al. v. Mexico*. Order of the Inter-American Court of Human Rights of April 15, 2010, Considering clauses 4 to 11.

29. With regard to the evidence given during the public hearing, the Court heard the expert testimony of the following persons:

13. Marcela Huaita, [FN26] lawyer, expert in gender, human rights, and public policy, proposed by the Inter-American Commission. She provided an opinion on: i) the challenges faced by women to obtain access to justice in cases involving rape; ii) the collection of evidence in rape cases, and iii) reparations in rape cases.

14. Clemencia Correa González, psychologist, expert in the treatment of political violence, with emphasis on gender; professor of the graduate program in human rights of the Universidad Autónoma de la Ciudad de México, expert witness proposed by the representatives. She provided an opinion on: i) the impact suffered by Mrs. Fernández Ortega, personally and with regard to her family, owing to the alleged rape and the supposed impunity of the case, and ii) the measures needed to repair the damage allegedly caused

15. Rosalva Aída Hernández Castillo, Ph.D. in social anthropology, professor and researcher of the Center for Research and Higher Education in Social Anthropology, specialized in studies on the situation of indigenous women in Mexico, expert witness proposed by the representatives. She provided an opinion on: i) the impact of the alleged rape of Mrs. Fernández Ortega on the indigenous community, especially the women; ii) the alleged harm of the social fabric of the community and the supposed impunity in the case, and iii) possible measures of reparation.

[FN26] On March 26, 2010, the Inter-American Commission requested the substitution of expert witness Fries Montelón. The President admitted the proposed substitution. Cf. Case of Fernández Ortega et al. v. Mexico. Order of the President of the Inter-American Court of Human Rights of April 8, 2010, Operative Paragraph 1.

B. Assessment of the documentary evidence

30. In this case, as in others, [FN27] the Court admits the probative value of those documents forwarded by the parties at the appropriate procedural opportunity, which were not contested or opposed and the authenticity of which was not questioned.

[FN27] Cf. Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Chitay Nech et al, supra note 18, para. 50, Case of Manuel Cepeda Vargas, supra note 18, para. 56.

31. On the other hand, the Court will examine, in the first place, the observations made by Mexico on some of the offered documents and in the brief of pleadings and motions, and then will rule on those that were provided by the representatives and the State following their brief of pleadings and motions and brief in response to the application, respectively.

32. The State raised objections to certain texts, [FN28] newspaper Articles [FN29] and documents concerning the domestic proceedings and the precautionary measures [FN30] that were submitted as documentary evidence by the Commission and by the representatives. It asked the Court not to admit these documents because “their content bears no relationship to the litis of this case,” and “their inclusion is intended to provide a context to the facts of the case, and this contravenes the nature of the Inter-American System of individual petitions.” In addition, it asked the Court not to admit certain documents provided by the Commission [FN31] and by the representatives [FN32] that “relate to the Mexican judicial system, which [...] is not the subject of this case,” because the investigations “have remained at the ministerial stage.”

[FN28] The State mentioned the following publications: United Nations Office of the High Commissioner for Human Rights in Mexico. Report on the Human Rights Situation in Mexico, [Diagnóstico sobre la Situación de los Derechos Humanos en Mexico], 2003 (file of annexes to the application, tome II, annex 2, folios 157 to 360); Amnesty International. Mexico: Indigenous

Women and Military injustice, [México: Mujeres indígenas e injusticia militar], November 23, 2004 (file of annexes to the application tome II, annex 3, folios 362 to 388); World Organization Against Torture, Geneva. Alleged rape of an elderly indigenous woman by members of the military results in her death, [Presunta violación sexual por militares resultando en muerte de una mujer indígena mayor], March 8, 2007 (file of annexes to the application, tome II, annex 22, folio 584 to 594); Juan Méndez, Guillermo O'Donnell, Paula Sergio Pinheiro. The (Un)Rule of Law and the Underprivileged in Latin America, Reducing Discrimination against Women in Mexico, a task for Sisyphus [Reduciendo la Discriminación contra las Mujeres en México, Una tarea de Sisyphus], Mariclaire Acosta, University of Notre Dame Press, 1998 (file of annexes to the

.C. (CENCOS). Always close, always far: The Armed Forces in Mexico [Siempre cerca, siempre lejos: Las fuerzas armadas en México], 2000 (file of annexes to the brief of pleadings and motions, tome I, annex A, folio 3781 to 3790); International Peace Brigades. Silenced: Violence against human rights defenders in the south of Mexico [Silenciados: Violencia contra defensores de derechos humanos en el sur de México], Newsletter of the Mexico Project, Special Edition on Ayutla, May 2009 (file of annexes to the brief of pleadings and motions, tome I, annex L, folio 3888 to 3899), and Amnesty International. Promoting the rights of indigenous peoples in Mexico. Organization of the Indigenous Me'phaa People. Human Rights Defenders [Promover los derechos de los pueblos indígenas de México. Organización del Pueblo Indígena Me'phaa. Defensores y Defensoras de Derechos Humanos], October 2008 (file of annexes to the brief of pleadings and motions, tome I, annex M, folio 3901 to 3904).

[FN29] The newspaper Articles mentioned by the State are as follows: Newspaper el Sur. Indigenous People protect narcotics crops: General Lopez Gutierrez ["Los indígenas protegen sembradíos de enervantes: General López Gutiérrez"], February 11, 2004 (file of annexes to the application, tome II, annex 21, folio 582); Newspaper La Jornada. El Sur. More rapes and homicides if the Army continues in the Mountain ["Más violaciones y homicidios si el Ejército sigue en la Montaña"], May 12, 1999 (file of annexes to the brief of pleadings and motions, tome I, annex B, folios 3792 and 3793); Newspaper La Jornada. El Sur. Conapo investigates forced sterilizations in the state of Guerrero ["Indaga Conapo esterilizaciones forzadas en el estado de Guerrero"], May 12, 1999 (file of annexes to the brief of pleadings and motions, tome I, annex N, folio 3906); Newspaper El Sur. Barranca Bejuco: Indigenous live in fear of military aggression ["Barranca Bejuco: indígenas viven con miedo a una agresión militar,"] March 5, 2002 (file of annexes to the brief of pleadings and motions, tome I, annex O, folios 3913 and 3914); Newspaper El Sur. Blame on members of the military for the harm, intimidation, and thefts in Me'paa of Ayutla communities ["Culpan a militares de daños, intimidación y robo en comunidades me'paa de Ayutla,"] March 29, 2002 (file of annexes to the brief of pleadings and motions, tome VI, annex Q, folios 5582 and 5583); Newspaper El Sur. Three complaints filed against soldiers in 15 days: Lugo Cortes. Regarding the attacks against women, seeking exit of Army from the Me'paa region ["Tres quejas contra soldados en 15 días: Lugo Cortés. Ante los ataques a mujeres, exigen la salida del Ejército de la región me'paa,"] March 25, 2002 (file of annexes to the brief of pleadings and motions, tome VI, annex R, folio 5587), and Newspaper El Sur. Obstruction in the MP for raped indigenous women seeking medical certificates ["Obstaculización en el MP a las indígenas violadas obtener certificado médico,"] March 28, 2002 (file of annexes to the brief of pleadings and motions, tome VI, annex GG(i), folio 5729).

[FN30] The State mentioned the following proceedings: IACHR. Precautionary measures No. MC 06-05 granted by the Commission on January 14, 2005 (file of annexes to the application, tome II, annex 24, folios 618 and 619); IACHR. Precautionary measures No. MC 167-07 granted by the Commission on September 20, 2007 (file of annexes to the application, tome II, annex 25, folios 621 to 623 and file of annexes to the brief of pleadings and motions, tome VI, annex CC, folios 5680 and 5681); Office of the Public Prosecutor of the Common Jurisdiction of the Allende Judicial District. Opening of Criminal Action 52/2008-II for the attack on Prisciliano Sierra, June 21, 2007 (file of annexes to the brief of pleadings and motions, tome VI, annex S, folios 5589 to 5596); Preliminary Investigation ALLE/SC/01/065/2006. Criminal action for the threats suffered by Mrs. Eugenio Manuel, February 3, 2009 (file of annexes to the brief of pleadings and motions, tome VI, annex T, folios 5598 to 5618); Preliminary Investigation ALLE/SC/01/065/2006. Order on exercise of the criminal action and on reparation of the damage against Mr. Morales Silvino and Mr. Rendón Cornelio, February 3, 2009 (file of annexes to the brief of pleadings and motions, tome VI, annex AA, folios 5649 to 5669); Complaint for the offense of threats, committed by Mr. Guzmán Remigio against Mr. Ramírez Rodríguez, May 1, 2007, originating Preliminary Investigation ALLE/SC/02/095/2007 (file of annexes to the brief of pleadings and motions, tome VI, annex BB, folios 5672 to 5678); IACHR. Communication from the Commission to the petitioners under Precautionary Measures 06-05, June 27, 2008 (file of annexes to the brief of pleadings and motions, tome VI, annex DD, folios 5683 and 5684); Assessment of the psychological impact of Ines Fernandez Ortega for rape in hands of Mexican soldiers by Alejandra Gonzalez Marin on August 13, 2009 (file of annexes to the brief of pleadings and motions, tome VI, annex EE, folios 5686 to 5712), and Office of the Public Prosecutor of the Common Jurisdiction of the Allende Judicial District domiciled in Ayutla. Preliminary Investigation ALLE/SC/01/032/2008 opened for the murder of Mr. Fernández Ortega, February 10, 2008 (file of annexes to the brief of pleadings and motions, tome VI, annex FF, folios 5714 to 5725).

[FN31] The State referred to the Commission's annex: IACHR. Access to Justice for Women Victims of Violence in the Americas, [Acceso a la Justicia para las Mujeres Víctimas de Violencia en las Américas], OEA/Ser. L/V/II.doc. 68, January 20, 2007 (file of annexes to the application, tome I, annex 1, folios 2 to 154).

[FN32] The State referred to the following annexes provided by the representatives found in the file of annexes to the brief of pleadings and motions: tome I, annex D, folios 3826 to 3872; tome VI, annex HH, folios 5777 to 5801; tome VI, annex II(i), folio 5808; tome VI, annex JJ, folio 5886; tome VI, annex KK, folios 5802 to 5806, and tome VI, annex LL, folios 5892 to 5894.

33. In relation to investigative articles or texts, the Court has already indicated that these are written documents that contain the authors' voluntary declarations or statements for public distribution. In this regard, the assessment of their content is not subject to the formalities required for testimonial evidence. However, their probative value depends on whether they corroborate or refer to aspects of the specific case. [FN33] Consequently, and given the general nature of the State's opposition, the Court decides to admit them and will assess them as it deems pertinent, taking into account the body of evidence, the observations of the State, and the rules of sound judicial discretion. Similarly, it will incorporate into the body of evidence of this case the documents that refer to the Mexican system of justice, because the Court considers that they are pertinent inasmuch as they relate to the alleged violation of the rights to judicial guarantees and

to judicial protection established in Articles 8 and 25 of the American Convention, which form part of the matter in dispute in this case.

[FN33] Cf. *Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 72.

34. Regarding the newspaper Articles forwarded by the representatives, this Court has found that they may be assessed when they refer to well-known public facts or statements made by State officials, [FN34] or when they corroborate aspects of the case. [FN35] The Court has verified that the date of publication of some of these documents is illegible. Nevertheless, none of the parties objected to the documents on this basis or questioned their authenticity. The Court decides to admit the documents that are complete or that, at least, allow their source and date of publication to be determined, and will assess them taking into account the body of evidence, the State's observations, and the rules of sound judicial discretion.

[FN34] For purposes of this Judgment, the Court will use the terms officials, employees, and public servants without distinction.

[FN35] Cf. *Case of Velásquez Rodríguez*, supra note 27, para. 140; *Case of Chitay Nech et al.*, supra note 18, para. 55, *Case of Manuel Cepeda Vargas*, supra note 18, para. 60.

35. Likewise, the Court adds other documents to the body of evidence, in application of Article 47(1) of the Court Rules of Procedure, because it deems them useful to the resolution of this case. [FN36]

[FN36] UN. Office of the High Commissioner for Human Rights, Professional Training Series No. 8, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, inhuman or degrading treatment, New York and Geneva, 2001 (<http://www.ohchr.org/Documents/Publications/training8Rev1sp.pdf>); World Health Organization, Guidelines for medico-legal care for victims of sexual violence, Geneva, 2003 (http://www.who.int/violence_injury_prevention/resources/publications/med_leg_guidelines/en/); Criminal Code of the state of Guerrero, published in the Official Gazette on November 14, 1986, (<http://www.guerrero.gob.mx/pics/legislacion/183/CPEG.pdf>); Code of Criminal Procedure of the state of Guerrero, published in the Official Gazette on February 5, 1993, (<http://www.guerrero.gob.mx/?P=leyesdetalle&key=19&tipo=2&mode=1&file=185>); Civil Code of the Free and Sovereign State of Guerrero, published in the Official Gazette on January 2, 1993 (<http://www.guerrero.gob.mx/?P=leyesdetalle&key=19&tipo=2&mode=1&file=190>); Federal Criminal Code of Mexico, published in the Official Gazette of the Federation on August 14, 1931, (<http://www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf>); Federal Code of Criminal Procedure, published in the Official Gazette of the Federation on August 30, 1934 (<http://www.diputados.gob.mx/LeyesBiblio/pdf/7.pdf>), and the Mexican Code of Military

Justice, published in the Official Gazette of the Federation on August 31, 1933 (<http://www.diputados.gob.mx/LeyesBiblio/pdf/4.pdf>).

36. Furthermore, with regard to the documents provided by the representatives and the State following the submission of the pleadings and motions brief and the brief in response to the application, respectively, the Court finds it opportune to recall that Article 46 of the Rules of Procedure, which regulates the admission of evidence, establishes:

1. Items of evidence tendered by the parties shall be admissible only if they are offered in the application of the Commission, in the pleadings, motions and evidence of the alleged victims, in the response to the application and observations to the pleadings and motions filed by the State or, when appropriate, in the document setting out the preliminary objections and the response thereto.

[...]

3. Should any of the parties allege force majeure, serious impediment, or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

37. At the public hearing, Mexico submitted a copy of the file of Preliminary Investigation No. SC/179/2009/II-E of the Military Public Prosecutor's Office based on "a principle of basic transparency and the certainty that only with all the elements" could the Court decide the present case. Moreover, at the end of the hearing, the State submitted numerous documents relating to "public, institutional and legislative policy measures" adopted by the State. [FN37]

[FN37] Cf. Record of receipt of documents of April 30, 2010 (case file on the merits, tome IV, folio 1588).

38. The representatives observed that this documentation "was not offered when presenting its response to the application" and that the State had not alleged any of the circumstances established in Article 46(3) of the Court Rules of Procedure "to justify the time-barred presentation of the evidence in question." Consequently, they added that it is not possible to guarantee equality of arms given the amount of information presented. As such, they "request[ed] that the evidence presented by the State at the public hearing [...] be summarily rejected."

39. Regarding the documents provided by Mexico during the public hearing that relate to different State actions and policies concerning violence against women and the investigation by the Military Public Prosecutor's Office, the Court observes that they were not submitted at the appropriate time; that is, with the response to the application. Moreover, Mexico failed to justify the late presentation by alleging force majeure, serious impediment, or supervening events, in other words, any of the reasons set out in the Court Rules of Procedure that, as exceptions, allow evidence to be submitted after the response to the application. Despite this, since they are

pertinent and useful for determining the facts of this case and the possible consequences, in accordance with Article 47 of the Rules of Procedure, the Court decides to admit said documentation.

40. Furthermore, also during the public hearing, the expert witnesses summoned to present their expert opinions handed over written copies of their opinions, which were distributed to the parties. The Court admits these documents, because it finds them useful for this case and, also, they were not contested, and their authenticity or veracity was not questioned.

41. In addition, both the State and the representatives forwarded documents attached to their final written arguments. Among other documents, the State provided a copy of Mexico's Official Norm: NOM-046-SSA2-2005 "Domestic Violence, Sexual Violence, and Violence against Women. Criteria for Prevention and Attention." For their part, the representatives forwarded vouchers for expenses related to this case among other documents. While the representatives' final arguments brief was submitted opportunely on May 24, 2010, the attachments were submitted a day after the allotted time had expired.

42. Regarding Mexico's Official Norm NOM-046-SSA2-2005, the representatives advised that this legal provision had not been applied in the investigation into the rape of Mrs. Fernández Ortega; it did not exist at the time of the facts, and it was not applied in this case after it had been published. In addition, the norm is based on international human rights instruments and, therefore, constitutes recognition by the State that, based on these instruments, there is and there was at the time of the facts a State obligation to pay special attention to victims of sexual violence. For its part, the Commission indicated that it had no observations on the documentation forwarded by Mexico.

43. The Court recalls that Mexico's Official Norm: NOM-046-SSA2-2005 was provided by the State in response to a request by the Court during the public hearing held in this case, and moreover, said document was provided by the State during the public hearing, [FN38] and whose admission has been accepted by the Court (*supra* para. 39). The Court will take into consideration the observations of the representatives with regard to both documents, together with the body of evidence, in application of the rules of sound judicial discretion.

[FN38] Mexican Official Norm NOM-046-SSA2-2005 "Domestic Violence, Sexual Violence, and Violence against Women. Criteria for Prevention and Attention"; published in the Official Gazette of the Federation on April 16, 2009. Cf. Record of receipt of documents, *supra* note 37, numeral 22.

44. Regarding the documents concerning expenses forwarded by the representatives, Mexico observed that they had not been submitted at the appropriate procedural opportunity and that, with this late presentation, "the representatives are attempting to rectify an aspect they omitted to comply with almost ten months ago." The Commission indicated that it had no observations to make in this regard.

45. In relation to the expense vouchers forwarded by the representatives on May 25, 2010, the Court observes that they were time-barred; nevertheless, it will admit them with exception because there was a minimum delay of one day, and because it does not appear that their admission will impair the State's defense. Notwithstanding the abovementioned, the Court will only consider those documents forwarded with the final written arguments that refer to new costs and expenses incurred due to the proceedings before this Court, namely, those incurred subsequent to the brief of pleadings and motions. (infra para. 298).

C. Assessment of the statements of the alleged victims and of the testimonial and expert evidence

46. Regarding the statements of the alleged victims and the witnesses, and the expert opinions provided during the public hearing and by means of sworn statements, the Court finds them pertinent only to the extent that they comply with the purpose defined by the President of the Court in the Order which required they be submitted (supra paras. 28 and 29), and in conjunction with the other elements of the body of evidence, taking into account the observations made by the parties. [FN39]

[FN39] Cf. *Loayza Tamayo v. Peru*. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of *Chitay Nech et al*, supra note 18, para. 56, and Case of *Manuel Cepeda Vargas*, supra note 18, para. 65.

47. The Court observes that the State in presenting its observations on the affidavits sent to it on March 31, 2010 was two days late. [FN40] The original time frame for forwarding the observations expired on April 7, 2010, which was extended until April 13, 2010, at the State's request. Despite this, Mexico submitted said observations at the end of the public hearing on April 15, 2010.

[FN40] Following an extension granted by the Court, the State forwarded its observations on Mrs. Eugenio Manuel's affidavit (Cf. case file on the merits, tome IV, folio 1580).

48. The representatives asked the Court not to take into consideration said observations of the State because the brief "was time-barred," and following an extension granted by the Court with the warning that the new time limit was non-extendible. The admission of said brief would violate "equality of arms and place the other parties to the proceedings in a situation of defenselessness" while "the principle of legal certainty would be seriously impaired in the present case."

49. Notwithstanding the aforementioned, given that the delay was minor and that, apart from the representatives' general assertions, it has not been proven that the admission of these observations would entail a procedural imbalance that would prejudice the parties or affect legal certainty, the Court admits the State's brief. For the same reasons, the Court admits the opinion

of expert witness Andreu Guzmán, forwarded by the Inter-American Commission three days after the time limit had expired, because the expert witness “had an insuperable technical problem.”

50. In relation to the statements of the alleged victims, the State affirmed, in general terms, that in the statements of Mrs. Fernández Ortega, of the girl Noemí Prisciliano Fernández, and Mr. Prisciliano Sierra, “[i]t is very evident that these three people were tutored when they gave their corresponding ‘testimony,’ because they coincide in trying to correct the errors [and contradictions] in which they incurred years before when making their respective statements before the Public Prosecutor’s Office.” Furthermore, Mexico questioned specific assertions in their testimony before this Court, when “they could have made them before the civil or village authorities many years ago.” Lastly, as an example of the rectification of supposed contradictions, the State mentioned the coincidence among the statements made in these proceedings with regard to the number of soldiers who were allegedly involved, contrary to what was indicated in their statements before the Public Prosecutor’s Office.

51. In particular, in relation to the statement of Noemí Prisciliano Fernández, the State affirmed that “it should be summarily rejected, because its content does not correspond to events she witnessed; in other words, most of her testimony is based on things her mother told her, which she then testified before the [n]otary as being her personal experience.” Furthermore, it asked the Court to set aside the part of the testimony “which refers to the threats that supposedly she and members of her family have suffered” because this “is not the purpose of the [litis] of this case, but rather of the provisional measures.”

52. With regard to Mr. Prisciliano Sierra’s statement, the State indicated that “he was not present during the events that allegedly took place on March 22, 2002,” therefore, his testimony should be considered “merely hearsay.” In addition, because they were not related to the purpose of the litis of this contentious case, the State asked the Court to reject the statements concerning: i) “the alleged threats against [him] made by [two individuals],” which are the purpose of the provisional measures only, and ii) “the alleged visits, in January 2003, that a group of [soldiers] made to [him].” Furthermore, it asked the Court not to admit the statement about the April 5, 2002, procedure conducted by the Civil Public Prosecutor’s Office, “because it does not correspond to the truth of the facts,” given that “there is no mention whatsoever of [his] presence and participation in this procedure.”

53. In keeping with the jurisprudence of the Court, the statements made by the alleged victims cannot be assessed alone, but rather together with all the evidence in the proceedings; [FN41] they are useful because they can provide more information on the alleged violations and their consequences. The Court observes that the intention of the State’s objections is to discredit the probative value of the statements made by the alleged victims in these proceedings. Basically, the State indicates that they differ from their previous statements before the domestic legal system; that two alleged victims were not eyewitnesses to specific events about which they testified, and that they refer to facts that are not part of the purpose of this case. The Court considers that these objections do not contest the admissibility of said evidence, but rather intend to question its probative significance. Taking the foregoing into account, the Court admits said statements; nevertheless, their probative value will be considered only insofar as they correspond

to the purpose defined by the President of the Court (supra para. 28), taking into account the entire body of evidence, the State's observations, and the rules of sound judicial discretion.

[FN41] Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and Costs, supra note 21, para. 70; Case of Chitay Nech et al, supra note 18, para. 56, and Case of Manuel Cepeda Vargas , supra note 18, para. 65.

54. With regard to the testimony of Mrs. Gutiérrez Moreno, the State indicated that "only 17 lines of its 10 pages refer to the [present case] and they contain subjective opinions." It added that "[t]he deponent refers to a series of situations that, apart from being mere subjective opinions, bear no relationship whatsoever to the case [sub judice]." Hence, "[i]f positive consideration is given to the deponent's assertions, it would seriously modify the legal grounds for the action of the Inter-American Commission and of the Court itself, because it would unduly alter the context with facts on which a ruling should also be made" by the Court. Mexico asked the Court to reject this entire testimony, "based on the assessment of situations other than the ones that the Court is examining," which do not bear a "direct relationship to the case under litigation."

55. As to the testimony of Mrs. Eugenio Manuel, among other aspects, the State observed that "the second part of her testimony [...] mentions the alleged acts of harassment and threats that gave rise to the provisional measures [related to the present case]," but which are not part of the contentious case. In the State's opinion, "the witness attempts to stress facts that bear no phenomenological relationship to the facts on which the litis of the case has been established," and which cannot be considered supervening. On the other hand, it also indicated that "there is no evidence that the ministerial authorities of Ayutla de los Libres refused to process the complaint filed by Mrs. [...] Fernández Ortega immediately." To the contrary, the record of March 24, 2010, which is in the case file before the Court, indicates that the criminal complaint for the offense of rape was received immediately, without any problems. Consequently, the State denied "the witness's assertion that there had been an unjustified delay by the agent of the [P]ublic [P]rosecutor's Office when the criminal complaint was filed."

56. In addition, Mexico indicated that the testimony of Mr. Ramírez Rodríguez "did not provide any new elements to those already supplied by [the alleged victims]" and that, to the contrary, it refers to "a series of circumstances and facts that have nothing to do with the [present case]." Based on the foregoing, it asked that the entire declaration be rejected.

57. As for the testimony of Mr. Lugo Cortés, the State indicated that part of it "is in conformity with the acknowledgement made by the State as regards some irregularities" committed by the authorities in the provision of health care and the search for justice in this case. On the other hand, "[a]nything related to the functioning of the other agencies is not an aspect of the [litis] of this case."

58. The Court notes that the State contested some of the testimonial statements, principally on the basis that the witnesses refer to facts that are outside the purpose of this case, or that there

is evidence that contradicts their affirmations. These observations refer to the merits of the dispute; therefore, in the corresponding section of the Judgment, the Court will assess these statements by the witnesses insofar as they correspond to the purpose defined by the President of the Court (*supra* para. 28), in accordance with the object of the litigation, taking into account the body of evidence, the State's observations, and the rules of sound judicial discretion.

59. Lastly, with regard to the expert opinions, the State asked the Court to reject the opinion of Mr. Carbonell Sánchez “because [the expert witness] did not take into consideration that, in the Mexican State, federal, state and military jurisdictions are fully demarcated.” If soldiers “take part in a crime against a civilian, it will be the courts of the common or federal judicial system that has jurisdiction, precisely *ratione personae*, and the military jurisdiction is legally and constitutionally prevented from hearing the case.”

60. Regarding the expert opinion of Mrs. Perlin, the State indicated that “the content of this expert opinion relates to her experience in the preparation of a diagnosis of access to justice for indigenous peoples in the state of Oaxaca, seeking to equate this experience to the [s]tate of Guerrero, without taking into account that the social reality of each state is totally different.” It added that the expert witness “has insufficient knowledge of the case and therefore makes a subjective appraisal of it, which leads her to reach erroneous conclusions.” Mexico asked the Court to reject this opinion completely, “because it is based on the subjective appraisal of the situation that prevails in the [s]tate of Guerrero as regards access to [j]ustice for the indigenous community, it expresses subjective opinions about how the investigation procedure was undertaken and her expertise is debatable for the effects of this case.”

61. The Court considers it pertinent to indicate that, contrary to the witnesses who should avoid giving personal opinions, the expert witnesses provide technical or personal opinions related to their specialized knowledge or experience. In addition, expert witnesses may refer both to specific points of the *litis* and to any other relevant point of the litigation, provided they circumscribe their comments to the purpose for which they were summoned [FN42] and that their conclusions are sufficiently founded. First, the Court notes that the expert opinions of Mr. Carbonell Sánchez and Mrs. Perlin refer to the purpose for which they were required (*supra* para. 28). In addition, in regard to the expert opinion of Mr. Carbonell Sánchez, the Court notes that Mexico's observations refer to the merits of the case, so that the pertinent aspects will be considered, in the corresponding section of the Judgment. With regard to the expert opinion of Mrs. Perlin, Mexico objected both to her qualifications as an expert and also to the content of her opinion. Regarding the evidence attached, the Court observes that said expert witness has broad international experience on issues of access to and administration of justice and has headed a project to make a specific diagnosis in Mexico of the issue that is the purpose of her opinion as an official of the United Nations Office of the High Commissioner for Human Rights in Mexico; a project with which the State's local and federal authorities collaborated. [FN43] Finally, the fact that the diagnosis of access to justice for indigenous peoples that she headed referred to a state other than Guerrero, is not a circumstance that, in itself, and in the absence of any other grounds, would disqualify the expert opinion. Based on the above, the Court decides to admit both opinions and will assess them together with the rest of the body of evidence, taking into account the State's observations and the rules of sound judicial discretion.

[FN42] Cf. *Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 42; *Case of Radilla Pacheco*, supra note 33, para. 97, and *Case of Chitay Nech et al*, supra note 18, para. 57.

[FN43] Cf. Report on Access to Justice for the Indigenous of Mexico, Case Study of Oaxaca [Diagnóstico sobre el Acceso a la Justicia para los Indígenas en Mexico, Estudio de Case of de Oaxaca], United Nations Office of the High Commissioner for Human Rights in Mexico and curriculum vitae of expert witness Perlin (case file on the merits, tome III, folios 1202, 1203, 1208 and 1440 to 1443).

D. Findings regarding evidence based on supervening facts

62. On December 4, 2009, the representatives forwarded as evidence based on supervening facts “recent information on the criminal investigation underway into the facts of the case.” They indicated that on October 30, 2009, the Office of the Attorney General for Justice of the state de Guerrero (hereinafter also “Guerrero Attorney General’s Office) notified the representatives that it had waived jurisdiction in favor of the Office of the Attorney General for Military Justice (hereinafter also “Military Attorney General’s Office”), “because those probably responsible for the facts [...] are members of the Mexican Army.” [FN44]

[FN44] Cf. Brief of the representatives of December 4, 2009, and copy of the notification of Order No. 345/2009 of the Public Prosecutor’s Office of the Common Jurisdiction, attached to the Special Prosecutor’s Office for Sexual and Domestic Violence of October 29, 2009 (case file on the merits, tome II, folio 450 and ff.).

63. In its response to the application, the State confirmed the rejection of jurisdiction in favor of the Military Public Prosecutor’s Office, outlined the normative grounds for this action, and indicated that it was in keeping with the laws in force.

64. For its part, the Inter-American Commission referred back to its observations in its Report on Merits and in the application concerning the military criminal justice system and underscored that “the intervention of the military criminal justice system in the investigation of a complaint of rape [allegedly] perpetrated against a civilian” cannot be justified.

65. The Court considers that this fact, effectively, forms part of the purpose of this case and, consequently, admits the copy of note No. 345/2009 of October 29, 2009, relating to Preliminary Investigation FEIDS VI/003/2009, provided by the representatives, under the terms of Article 46(3) of the Rules of Procedure, and will consider the information contained therein, to the extent pertinent.

66. Subsequently, on March 23, 2010, the representatives forwarded information and documents as evidence of alleged supervening facts related to alleged acts of harassment and threats against witness Eugenio Manuel and one of the organizations that represent Mrs.

Fernández Ortega. [FN45] In their opinion, these acts would “clearly constitute additional obstacles to the search for justice” in the present case.

[FN45] Cf. Brief of March 23, 2010, and copy of the note that was supposedly found in the OPIM office in Ayutla de los Libres on March 6, 2010 (case file on the merits, tome III, folio 809) and copy of the complaint filed on March 11, 2010, by Mrs. Eugenio Manuel before the Public Prosecutor adjoined to the Commission for the Defense of Human Rights of the state of Guerrero, registered under Preliminary Investigation GRO/SC/021/2010 (case file on the merits, tome III, folios 811 to 819).

67. The Commission indicated that “the recent threats are an example of the vulnerability of the beneficiaries of the provisional measures connected to this case [...]; not only do they continue to be permanently at risk, but this state of affairs tends to worsen when one of the cases that originated the situation of risk, which the measures of protection are intended to counter, is imminent.”

68. The State indicated that “it is evident that these facts bear no relationship to the litis of the matter and do not contribute any elements that [the Court] can take into consideration to help it decide” the case. Furthermore, it indicated that the representatives “have made unsubstantiated assumptions to try to connect the [alleged] rape of Mrs. Fernández Ortega with the procedure relating to provisional measures, initiated owing to the alleged threats against OPIM and the members of the Tlapaneca community, although they are fully aware that the alleged threats are not part of the litigation of the case sub judice.” The foregoing are “two proceedings with two distinct litigations that are totally disconnected.” One is the current contentious proceeding and the other the procedure relating to provisional measures ordered in favor of Mrs. Fernández Ortega et al. on April 30, 2009. According to the State, the facts reported by the representatives “do not have the least phenomenological connection with the facts of these proceedings; to the contrary, they attempt to introduce into the dispute facts that differ from those that constitute its factual framework.”

69. Regarding the facts of the present case, the Court finds it appropriate to recall that the application constitutes the factual framework of the proceedings. As it has indicated previously, [FN46] although the parties may submit supervening facts to the Court at any stage of the proceedings prior to delivery of the Judgment, this does not mean that any situation or event constitutes a supervening fact for the effects of the proceedings. A fact of this nature must have a phenomenological connection to the facts of the proceedings; consequently, it is not sufficient that a specific situation or act is related to the purpose of the case for this Court to be able to rule on it. Moreover, the submission of alleged supervening facts does not constitute a new opportunity for the parties to introduce facts that differ from those that form the factual framework of the proceedings.

[FN46] Cf. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 56; Case of Perozo et al. v.

Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 67, and Case of González et al. (“Cotton Field”), supra note 15, para. 17.

70. In this case, as in many others, a procedure for provisional measures is being developed in parallel, but autonomously, to the processing of the contentious case. The purpose of the former procedure, which is of an accessory, precautionary and protective nature, is distinct from the purpose of the latter, as regards the facts, the procedural aspects, the assessment of the evidence, and the scope of the decisions. Although the facts, arguments, legal grounds or probative elements aired in the context of the provisional measures may be closely related to the facts of a contentious case, they cannot automatically be considered supervening facts.

71. The Court observes that the information forwarded by the representatives relates to the alleged threatening acts against a witness and one of the organizations that represent Mrs. Fernández Ortega; that is, they do not concern the purpose of this contentious case, and the alleged facts are not directed against the alleged victims hereof. Thus, in accordance with Article 46(3) of the Rules of Procedure, these documents are not admitted as evidence of alleged supervening facts concerning this contentious case. Notwithstanding the foregoing, the Court recalls that the alleged acts of harassment and threats against individuals directly and indirectly linked to this case are being considered by the Court by way of the provisional measures it has ordered (supra Chapter V).

72. Finally, with its final written arguments, Mexico provided a copy of the proceedings under Preliminary Investigation No. SC/179/2009/II-E of the Military Attorney General’s Office, while the representatives forwarded documents concerning alleged supervening facts that took place during May 2010.

73. The representatives observed that the proceedings of said Preliminary Investigation prior to December 13, 2009, could not be considered evidence of supervening facts; hence, admitting them would violate legal certainty and equality of arms. However, should they be accepted, they indicated that said documents “illustrate the State’s persistence in breaching its international commitments in the area of human rights and the mandates of the Court,” given that the State continues processing the investigation of the rape under the military justice system. Even though they indicated that this issue had been referred to previously, they made several observations on the measures adopted in the investigation, “revealing that the military justice system is not only incompetent, but also partial, inadequate, and ineffective.” The Commission indicated that it had no observations to make on the documentation forwarded by Mexico.

74. With regard to the documents of Preliminary Investigation No. SC/179/2009/II-E of the Military Attorney General’s Office forwarded by the State together with its final written arguments, the Court observes that these procedures carried out between January 6, 2010, and May 21, 2010; in other words, after the date of the response to the application, so they could not be provided previously. Therefore, these documents will be considered evidence of supervening facts in the terms of Article 46(3) of the Rules of Procedure and admitted to the extent that they are pertinent. The Court will take into consideration the corresponding observations of the

Commission and of the representatives, as well as the body of evidence, in application of the rules of sound judicial discretion.

75. Regarding the documents on alleged supervening facts forwarded by the representatives, the State indicated that these facts concern the provisional measures ordered by the Court, which do not form part of the purpose of the present contentious case. The facts do not have a phenomenological connection with the facts of this case, and exceed its factual framework. For its part, the Commission indicated that it had no observations to make in this regard.

76. Regarding the documentation about the events that allegedly occurred on May 17, 2010, recounting that Ana Luz Prisciliano Fernández, one of the alleged victims in this case, was followed and received death threats, the Court indicates that these events do not form part of the merits of the present case and, therefore, cannot be admitted pursuant to Article 46(3) of the Rules of Procedure. Notwithstanding the foregoing, the Court will consider these facts in the context of the provisional measures duly ordered.

VIII. ARTICLES 5 (RIGHT TO HUMANE TREATMENT) [FN47] AND 11 (RIGHT TO PRIVACY [HONOR AND PROTECTION]), [FN48] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN49] OF THE AMERICAN CONVENTION AND 1,2, AND 6 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE [FN50], AND 7 OF THE CONVENTION OF BELEM DO PARA. [FN51]

[FN47] Article 5 of the Convention establishes, inter alia:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

[FN48] Article 11 of the Convention establishes, inter alia:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

[FN49] Article 1(1) of the Convention establishes, inter alia: “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

[FN50] The Inter-American Convention to Prevent and Punish Torture establishes, inter alia:

Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of

methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

Article 6.

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

[FN51] Article 7(a) and (b) of the Convention of Belém do Pará, establishes, in what is relevant, that:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation[, and]
- b. apply due diligence to prevent, investigate and impose penalties for violence against women[.]

77. In order to analyze the alleged violations of the rights recognized in Articles 5 and 11 of the American Convention and alleged noncompliance with the obligations enshrined in other related Inter-American instruments, the Court will establish: a) the facts of the present case related to the alleged rape; b) the arguments of the parties in this respect, and will examine: c) if arising from the evidence at the disposition of the Tribunal, the Court can find the State is internationally responsible in this respect; d) the legal classification of alleged facts stated; e) the alleged harm to the personal integrity related to the search for justice, and f) the alleged unwarranted intrusion into the place of residence.

A. Facts relating to the alleged rape of Mrs. Fernández Ortega

78. The facts of the present case occurred in the context of a significant military presence in the state of Guerrero, [FN52] aimed at repressing unlawful activities such as organized crime. It has been reported that fundamental rights were violated during the repression of such activities. [FN53] In Guerrero, an important percentage of the population belongs to indigenous communities, who conserve their traditions and cultural identity and reside in municipalities with a large amount of marginalization and poverty. [FN54] In general, the indigenous population is in a situation of extreme vulnerability, and this is revealed in different forums, such as in the administration of justice and health care services. In many cases, the members of this population are defenseless because they do not speak Spanish and do not have interpreters, owing to the absence of financial resources to hire a lawyer, to travel to health care centers or to the courts, and also because they are often victims of abusive practices or practices that violate due process. [FN55] Owing to this situation, members of the indigenous communities do not use the organs of justice or the public agencies engaged in the protection of human rights, because they distrust them or because they fear reprisals. [FN56] In the case of indigenous women, the situation is even worse, because filing complaints concerning certain events has become a challenge that

requires them to overcome many obstacles, including rejection from their own community as well as other “harmful traditional practices.” [FN57]

[FN52] Cf. Report 2003, United Nations Office of the High Commissioner for Human Rights in Mexico, *supra* note 28, folio 325); Report regarding violence against women in the Municipalities of the Mountain region of Guerrero [Diagnóstico sobre violencia contra las mujeres en los Municipios de la región de la Montaña de Guerrero], Secretariat for Women’s Affairs in the state of Guerrero and others (file of annexes presented by the State during the public hearing, tome X, annex 7, folio 13628), and sworn statement made before a public notary by the expert witness Stavenhagen on March 29, 2010, (case file on the merits, tome III, folio 1444).

[FN53] Cf. Report 2003, United Nations Office of the High Commissioner for Human Rights in Mexico, *supra* note 28, folio 325; Report, Secretariat for Women’s Affairs of the state of Guerrero and others, *supra* note 52, folios 13635 and 13636; Always close, always far: The Armed Forces in Mexico [Siempre cerca, siempre lejos: Las fuerzas armadas en México], *supra* note 28, folios 3783, 3784, 3786 to 3790, and sworn statement made before a public notary by expert witness Stavenhagen, *supra* note 52, folio 1444.

[FN54] Cf. Report, Secretariat for Women’s Affairs of the state of Guerrero and others, *supra* note 52, folio 13615; Program for the institutional and social strengthening for the exercise of the rights of indigenous women: Illiteracy, Violence against women, Maternal Mortality [Programa para el fortalecimiento institucional and social para el ejercicio de los derechos humanos de las mujeres indígenas: Analfabetismo, Violencia contra las mujeres, Mortalidad Materna], Secretariat of Women, Secretariat of Indigenous Matters, Secretariat of Education, Secretariat of Health, and Attorney General of Justice Office of the State, Guerrero Government of the State, July 2008 (file of annexes presented by the State during the public hearing, tome IX, annex 4, folio 12993 and 12994); Model of Reference of Cases of Gender Violence for the state of Guerrero [Modelo de Referencia de casos de Violencia de Género para el Estado de Guerrero], Secretariat of Women’s Affairs for the state of Guerrero, December 2008 (file of annexes presented at the public hearing, tome X, annex 6(5), folios 13412 and 13413); Report on the Human Rights of women in Guerrero, Sociodemographic information of the Municipality of Ayutla de los Libres [Diagnóstico de los Derechos Humanos de las mujeres en Guerrero, Información sociodemográfica del Municipio de Ayutla de los Libres], Secretariat of Indigenous Matters of the state of Guerrero, 2010. (file of annexes presented at the public hearing, tome IX, annex 3, folio 12871), and statement made before public notary by the expert witness Stavenhagen, *supra* note 52, folio 1444.

[FN55] Cf. Reference Model 2008. Secretariat of the Women’s Affairs by the state of Guerrero, *supra* note 54, folio 13412, and Development of Networks for the detection, support, and reference of cases of violence against indigenous women of Guerrero [Desarrollo de Redes de detección, apoyo y referencia de casos de violencia contra las mujeres indígenas de Guerrero], Secretariat for Women’s Affairs of the state of Guerrero and National Network of Shelters, December 2008 (file of annexes submitted at the public hearing, tome X, annex 6(4), folios 13242 to 13251).

[FN56] Cf. Report 2003, United Nations Office of the High Commissioner for Human Rights in Mexico, *supra* note 28, folios 325 and 326, and declaration rendered before a public notary by expert witness Stavenhagen, *supra* note 52, folio 1445.

[FN57] Cf. Network Development 2008, Secretariat for Women's Affairs of the state of Guerrero and National Network of Shelters, *supra* note 55, folio 13248, and declaration rendered before a public notary by expert witness Stavenhagen, *supra* note 52, folio 1445 to 1447.

79. Among the forms of violence that most affect women in the state of Guerrero, there exists "institutional military violence." [FN58] The presence of the army performing police work in Guerrero has been a polemic issue regarding individual and communitarian rights and freedoms, and this situation has placed the population, particularly the women, in a situation of extreme vulnerability. [FN59] According to the Secretariat for Women's Affairs in the state of Guerrero, "[i]ndigenous women continue to suffer the consequences of a patriarchal structure that is blind to gender equity, particularly within institutions such as the armed forces or police, whose members are trained to defend the nation, and to combat or attack criminals, but who are not sensitized to the human rights of the community and of women." [FN60] In this context, between 1997 and 2004, complaints were filed in six cases of the rape of indigenous women attributed to members of the Army in the state of Guerrero, which were all heard in the military jurisdiction, [FN61] and there is no evidence that those responsible have been punished in any of these cases.

[FN58] Cf. Report, Secretariat for Women's Affairs of the state of Guerrero and others, *supra* note 52, folios 13628, 13634, and 13625, and Report 2003, United Nations Office of the High Commissioner in Mexico, *supra* note 28, folio 325.

[FN59] Cf. Report, Secretariat for Women's Affairs of the state of Guerrero and others, *supra* note 52, folio 13635.

[FN60] Network Development 2008, Secretariat for Women's Affairs of the state of Guerrero and National Network of Shelters, *supra* note 55, folio 13247.

[FN61] Cf. Report, Secretariat for Women's Affairs of the state of Guerrero and others, *supra* note 52, folios 13635 and 13636, and sworn statement rendered before a public notary by expert witness Stavenhagen, *supra* note 52, folio 1446.

80. Mrs. Fernández Ortega is an indigenous woman and a member of the Me'phaa indigenous community; she resides in Barranca Tecoani, state of Guerrero. [FN62] At the time of the facts, she was 25 years of age, [FN63] and she was married to Mr. Prisciliano Sierra [FN64] with whom she had four children, and a daughter who was born two years later. [FN65] Mrs. Fernández Ortega, a housewife, took care of the animals and planted different crops on the family's plot of land. [FN66] The community of Barranca Tecoani is located in an isolated mountainous area, and consequently, access is difficult. [FN67]

[FN62] Cf. Sworn statement rendered before a public notary by Mrs. Fernández Ortega on March 19, 2010 (case file on the merits, tome III, folio 1483).

[FN63] Cf. Birth certificate of Mrs. Fernández Ortega (case file of annexes to the brief of pleadings and motions, tome I, annex E, folio 3874).

[FN64] Cf. Marriage certificate of Mr. Prisciliano Sierra and Mrs. Fernandez Ortega on April 29, 1995 (case file of annexes to the brief of pleadings and motions, tome I, annex F, folio 3876).

[FN65] Cf. Birth certificates of Noemi, Ana Luz, Colosio, Nelida, and Neftalí, all with the last name of Prisciliano Fernández. Nevertheless, on the birth certificate of the girl Ana Luz, her last name is “Ortega” (case file of annexes to the brief of pleadings and motions, tome I, annexes G to K, folios 3878 to 3886).

[FN66] Cf. Sworn statement rendered before a public notary by Mrs. Fernández Ortega, supra note 62, folios 1483 and 1487, and sworn statement rendered before a public notary by Mr. Prisciliano Sierra on March 19, 2010 (case file on the merits, tome III, folios 1499 and 1500).

[FN67] Cf. Sworn statement of Mr. Lugo Cortes made before a public notary on March 25, 2010 (case file on the merits, tome III, folios 1531 and 1532), and final written arguments of the State (case file on the merits, tome V, folio 2474).

81. On March 22, 2002, at around three in the afternoon, Mrs. Fernández Ortega was at home with her four children, Noemí, Ana Luz, Colosio, and Nélida, all bearing the surname of Prisciliano Fernández, when a group of approximately eleven soldiers, in uniform and carrying weapons, approached the house. Three of them entered her home. [FN68]

[FN68] Cf. Sworn statement of Mrs. Fernández Ortega made before a public notary, supra note 62, folios 1483 y 1484, and sworn statement rendered before a public notary by Noemí Prisciliano Fernández on March 22, 2010 (case file on the merits, tome III, folio 1493).

82. Mrs. Fernández Ortega stated that the three soldiers entered the house without her consent and asked her several times “where did your husband go to steal meat,” to which she did not answer them because she did not speak Spanish well and because she was afraid. The soldiers pointed their rifles at her and repeated the same question, and then, one of them grasped her hands and pointing his rifle at her, told her to lie on the floor, which she did. Once on the floor, another soldier grabbed the alleged victim’s hands with his right hand and, with the other, pulled down her skirt and underwear and raped her while the other two observed. Afterwards, those three individuals left the house, and along with those who had staid outside of the house, left the area. [FN69]

[FN69] Cf. Sworn statement of Mrs. Fernández Ortega made before public notary, supra note 62, folio 1484; complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, on March 24, 2002 (case file of annexes to the answer to the application, tome II, folio 6836); brief requesting expansion of the complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, on April 18, 2002, (case file of annexes to the answer to the application, tome II, folios 6869 y 6870).

83. While the soldiers were inside the home inflicting harm upon Mrs. Fernandez Ortega, in the moments immediately prior to the rape, her four children ran to their grandparents house, which was nearby. When the group of soldiers left the property, the children returned home

accompanied by their paternal grandfather, and found their mother crying. [FN70] Later, when her husband arrived home, she told him what had happened. [FN71]

[FN70] Cf. Sworn statement of Noemí Prisciliano Sierra made before a public notary, supra note 68, folio 1494; Sworn statement of Mrs. Fernández Ortega made before a public notary, supra note 62, folio 1484, and complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, supra note 69, folio 6836.

[FN71] Cf. Sworn statement of Mr. Prisciliano Sierra made before a public notary, supra note 66, folio 1500.

84. The following day, Mr. Prisciliano Sierra went to the headquarters of the Organización del Pueblo Indígena Me’paa en Ayutla de los Libres [Organization of Indigenous Me’Paa People in Ayutla of los Libres] in order to recount to Mrs. Eugenio Manuel and Mr. Ramirez Rodriguez, members of said organization, that which had occurred to his wife. Mrs. Eugenio Manuel telephoned Mr. Lugo Cortés, Inspector General of the Commission for the Defense of Human Rights of Guerrero (hereinafter also “Guerrero Human Rights Commission” or “CODDEHUM”), in order to submit the corresponding complaint, and he came over to the OPIM Office. Subsequently, the four of them went to Mrs. Fernández Ortega’s home and took her to a private doctor in Ayutla, because “[s]he felt very ill.” [FN72] The doctor merely prescribed a medicine for the pain, because, “according to him, there was no other medicine.” [FN73]

[FN72] Cf. Sworn statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folios 1500 and 1501; sworn statement of Mrs. Eugenio Manuel on March 19, 2010 before a public notary (case file on the merits, tome III, folio 1152); sworn statement of Mr. Ramírez Rodríguez made before a public notary (case file on the merits, tome III, folios 1510 and 1511); sworn statement of Mr. Lugo Cortés made before a public notary, supra note 67, folios 1530 to 1533, and sworn statement of Mrs. Fernández Ortega before a public notary, supra note 62, folios 1484 and 1485, who declared that after the events occurred, “she was very cold and felt pain in [her] belly, as well as when she went to the bathroom.”

[FN73] Cf. Sworn statement of Mr. Lugo Cortés made before public notary, supra note 67, folio 1533, and sworn statement of Mrs. Fernandez Ortega made before public notary, supra note 62, folio 1485.

85. On March 24, 2002, Mrs. Fernández Ortega, accompanied by Mr. Prisciliano Sierra, Mrs. Eugenio Manuel, and Mr. Lugo Cortés, went to the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, located in the municipality of Ayutla los Libres, Guerrero (hereinafter “Allende Public Prosecutor’s Office”) to file a complaint concerning the facts, resulting in preliminary Investigation ALLE/SC/03/76/2002. [FN74] Since Mrs. Fernández Ortega had difficulty speaking Spanish, because her mother tongue Me’phaa, Mrs. Eugenio Manuel acted as interpreter in the sworn statement. [FN75] When the alleged victim indicated that the perpetrators of the incident had been soldiers, an agent at the Public Prosecutor’s Office

told them “that he did not have time to receive the complaint.” [FN76] Finally, following the intervention of the Inspector General of the Guerrero Human Rights Commission, an official of the Public Prosecutor’s Office took Mrs. Fernández Ortega’s statement about the facts in the presence of other people who were in the offices of this public institution. [FN77] The Public Prosecutor’s Office sent a request to the district forensic physician asking him “to examine [Mrs.] Fernández Ortega as soon as possible [and] to submit a medical gynecological certificate of the injuries.” [FN78] Both Mrs. Fernández Ortega and Mr. Lugo Cortés insisted that she should be examined by a female doctor. [FN79] Owing to the absence of a female doctor who could perform the medical examination, the Public Prosecutor’s Office referred the alleged victim to the Ayutla General Hospital. [FN80]

[FN74] Cf. Complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, supra note 69, folio 6826; sworn statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folios 1500 and 1501; sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152; sworn statement of Mr. Lugo Cortés before a public notary, supra note 67, folio 1533, and sworn statement of Mrs. Fernández Ortega before a public notary, supra note 62, folio 1485. Likewise, on March 24, 2002, the Commission for the Defense of Human Rights of the state of Guerrero made a visit to initiate the preliminary investigation of the Public Prosecutor of the Common Jurisdiction for rape offenses, breaking and entering, abuse of authority, and the consequences thereof, to the detriment of Mrs. Fernández Ortega, cf. Order No. 847/2002 issued by the CODDEHUM, addressed to the Agent of the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, of March 24, 2002 (case file of annexes to the application, tome IV, appendix 4, folio 1931).

[FN75] Cf. Complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, supra note 69, folios 6828 and 6835; sworn statement of Mrs. Fernandez Ortega before a public notary, supra note 62, folio 1485; sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152, and sworn statement of Mr. Lugo Cortés before public notary, supra note 67, folio 1534.

[FN76] Cf. Sworn statement of Mrs. Fernandez Ortega before a public notary, supra note 62, folio 1485; sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152; sworn statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folio 1501, and sworn statement of Mr. Lugo Cortés before public notary, supra note 67, folio 1534.

[FN77] Cf. Sworn statement of Mrs. Fernandez Ortega before public notary, supra note 62, folio 1485, and sworn statement of Mr. Lugo Cortés before public notary, supra note 67, folio 1534.

[FN78] Cf. Complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, supra note 69, folio 6826 and Order No. 283 issued by the Public Prosecutor of the Common Jurisdiction on March 24, 2002 (case file of annexes to the answer to the application, tome II, folio 6831).

[FN79] Cf. Sworn statement of Mrs. Fernandez Ortega before a public notary, supra note 62, folio 1485, and sworn statement of Mr. Lugo Cortés before public notary, supra note 67, folios 1534 and 1535. In this respect, see also Order No. 847/2002 issued by the CODDEHUM, supra note 74, folio 1931.

[FN80] Cf. Order No. 286 issued by the Common Public Prosecutor's Office, addressed to the Director of Ayutla General Hospital, on March 24, 2002, (case file of annexes to the answer to the application, tome II, folio 6839).

86. The same day, March 24, 2002, Mrs. Fernández Ortega went to the Ayutla General Hospital, where she asked to be examined by a female physician. There was no female doctor in the hospital at the time; she was therefore told to return during normal working hours from Monday to Friday when there would be female personnel. [FN81] On March 25, 2002, Mrs. Fernández Ortega went again to the Ayutla General Hospital, and a female general practitioner from the hospital performed a gynecological examination, based on which she determined that the alleged victim "did not show signs of violence," and she requested that laboratory tests be carried out. [FN82]

[FN81] Cf. Statement of a doctor before the Military Public Prosecutor's Office adjoined to the 35th Military Zone on May 3, 2002 (file of annexes to the application, tome IV, annex 4, folio 1908), and Order 0176/02 issued by the Director of the General Hospital of Ayutla addressed to the Common Public Prosecutor's Office of the Judicial District of Allende, on March 26, 2002 (file of annexes to the answer to the application, tome II, folio 6842).

[FN82] Cf. Note issued by a female doctor of the Ayutla General Hospital on March 25, 2002 (file of annexes to the response, tome II, annex 7, folio 398), and Order 0176/02 issued by the Director of the Ayutla General Hospital, supra note 81, folio 6842. -----

87. On April 4, 2002, the Director of the Ayutla General Hospital informed the agent at the Public Prosecutor's Office that "the requested tests had not been performed owing to the lack of the required chemical reagents." On April 5, 2002, Mrs. Fernández Ortega asked the Public Prosecutor's Office to require the Director of said hospital "to, as quickly as possible, issue a report on her physical and gynecological examination and on the tests carried out on her" on March 25, 2002, and also to "explain, in writing, what his medical personnel had done with the samples [...] that had been taken in order to conduct the laboratory tests the doctor had requested, since the [D]irector of the [H]ospital [...] had advised that [it] did not have the necessary chemical reagents to perform the requested tests." On April 18, 2002, Mrs. Fernández Ortega expanded her statement before the Allende Public Prosecutor's Office and her oldest daughter, Noemí Prisciliano Fernández, testified about the incident that took place on March 22, 2002. [FN83]

[FN83] Cf. Expansion of statement of Mrs. Fernández Ortega on April 18, 2002, supra note 69, folios 6869 to 6871, and statement of the girl Noemi Prisciliano Fernandez before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende on April 18, 2002 (case file of annexes to the answer to the application, tome II, folio 6862 to 6865).

88. The expert testimony provided by a chemistry expert on July 9, 2002, determined the presence of “seminal liquid” and “sperm cells” in the samples sent to the laboratory on July 5, 2002. [FN84]

[FN84] Cf. Forensic Chemistry Report No. PGJE/DGSP/XXVI-II/305/02 issued by the Attorney General for Justice, General Office of Investigatory Services, on July 9, 2002 (file of annexes to the response to the application, tome V, folio 7830).

89. Then, on August 16, 2002, the Forensic Chemistry Coordinator of the Office of the Attorney General for Justice informed the Military Prosecutor’s Office, which had declared itself competent to continue the investigation, that “the samples obtained from [Mrs.] Fernández Ortega’s vaginal cavity [...] were no longer in the biological records because they had been used up during their examination.” [FN85] Subsequently, he also indicated that “the two slides taken from the vaginal cavity of [Mrs.] Fernández Ortega [...] were also used up during the tests.” [FN86]

[FN85] Order No. PGJE/DGSP/XXVI-II/096/02 issued by the Coordinator of the Forensic Chemistry Report of the Attorney General for Justice, General Office of Investigation Services, on August 16, 2002, (case file of annexes to the application, tome II, annex 11, folio 406).

[FN86] Cf. Order No. PGJE/DGSP/XXVI-II/426/2002 issued by the Coordinator of Forensic Chemistry of the Attorney General for Justice, General Office of Investigation Services, on September 25, 2002 (file of annexes to the application, tome II, annex 12, folio 408).

B. Arguments of the parties

90. The Commission indicated that rape committed by members of the State’s security forces against members of the civilian population constitutes a grave violation of human rights protected in Articles 5 and 11 of the American Convention. In cases involving the rape of indigenous women, the pain and humiliation is exacerbated because they are indigenous, since “they do not know the language of their attackers and of the authorities that intervene[, and] also owing to the repudiation of their community as a result of the facts.” Mrs. Fernández Ortega “was a victim of rape by members of the Mexican Army” based, among others, on the following evidence: i) Mrs. Fernández Ortega’s statement before the civil authorities and its subsequent expansion; ii) her daughter Noemí Prisciliano Fernández’s statement; iii) the presence of sperm in the samples taken from the alleged victim’s vaginal cavity; iv) the psychiatric certification of the expert physician adjoined to the National Human Rights Commission (hereinafter “CNDH”) stating that the alleged victim had suffered a traumatic experience; v) the undisputed fact of the military presence in the region at the time of the incident; vi) reports of United Nations agencies indicating that information had been received concerning complaints of sexual abuse against indigenous women in Guerrero, and vii) the expert report of Mrs. Correa González, in which she indicated that Mrs. Fernández Ortega had undergone a traumatic experience. She also underscored, “that, at the domestic level, the increased sexual abuse of women for political

purposes has been documented, particularly in areas where there is intense militarization, such as in the states of Chiapas, Oaxaca, Veracruz, and Guerrero.”

91. The Commission added that, in addition to affecting the physical, psychological, and moral integrity of the victim, breaking her dignity, rape invades one of the most intimate spheres of an individual’s life, invading her physical and sexual space, and taking away her ability to make autonomous decisions concerning her own body. In addition, rape in the presence of a member of the family has a particularly serious significance, increasing the humiliation of the victim and the trauma for both of them. Consequently, it asked that the Court to declare the State responsible for the violation of Article 5(1) and Article 11 of the American Convention, to the detriment of Mrs. Fernández Ortega, in relation to Article 1(1) thereof. Lastly, it asked the Court to declare that the abuse of Mrs. Fernández Ortega’s physical, psychological, and moral integrity committed by State agents constituted torture, because the requisites for this offense were fulfilled: i) it was an act that inflicted anguish and physical and psychological suffering; ii) it was committed with a purpose, and iii) by a public official. Furthermore, the Commission considered that the investigation that the State must conduct into acts that violate Article 5(1) of the Convention is also regulated by Articles 1, 6, and 8 of the Convention Against Torture.

92. The representatives argued that the rape of Mrs. Fernández Ortega had clearly been proven and that the absence of additional probative elements is solely and exclusively the responsibility of the State, which failed to conduct an effective investigation. In addition to the sexual abuse committed by the direct perpetrator, “she was the victim of another type of sexual abuse committed by the other two soldiers present at the scene of the incident, inasmuch as their presence ensured greater control by the material perpetrator, but also because they remained to observe what happened.” Rape is an exceptionally serious type of sexual abuse that “was used by the soldiers to express domination.” In addition, the rape “was an expression of extreme discrimination [...] owing to her condition as an indigenous person and owing to her condition as a woman” and it sought “to humiliate and to terrorize, and to send a warning message to the community.” These factors “profoundly affected the physical and psychological integrity of [the alleged victim, and] constituted clear acts of violence against women.” Based on the foregoing, the representatives asked the Court to declare that the State of Mexico is responsible for the violation of Articles 7(a) of the Convention of Belem do Para, and Articles 5 and 24 of the American Convention, in relation to Article 1(1) of the same.

93. The representatives agreed with the Commission in considering that the alleged rape suffered by Mrs. Fernández Ortega “should be deemed an act of torture,” given that the three elements were met: i) it was an intentional act; ii) that caused severe suffering, and iii) committed with an end or purpose. The fact that the alleged rape was perpetrated by soldiers particularly affected Mrs. Fernández Ortega, and she was also disturbed by the presence of her children when she was assaulted. Aside from living “with fear that what happened to her could also happen again or happen to her daughter, given the presence of the military in the area where she resides,” she blames herself for what occurred. They also noted that the irregularities and impunity in which the case remains, demonstrates the State’s noncompliance with its obligation to guarantee the victim’s right to a serious and effective investigation of the acts of violence and torture suffered. Given the aforementioned, the representatives requested the Court to declare the State of Mexico responsible for the violation of Article 5(2) of the American Convention, 7(b) of

the Convention of Belem do Para, and Articles 1, 6, and 8 of the Inter-American Convention Against Torture.

94. The representatives added that, “the rape of [the alleged victim] constituted one of the most aggressive intrusions to a woman’s privacy. The State agent who raped her invaded her body in the most arbitrary way, affecting her most intimate sphere,” thereby denying “her right [...] to the possibility of choosing with whom and how to establish personal relationships, because he obliged her to have sexual relations with him, violently and against her will.” Moreover, it “affected both [Mrs. Fernández Ortega’s] opinion of herself and her reputation.” Although the representatives did not consider that a woman’s reputation is harmed whenever a rape occurs, this did happen in the present case; consequently, the alleged victim’s right to honor and dignity were violated. Likewise, they stated that this right has also been violated owing to the absence of an adequate investigation into the facts because, despite the gravity at hand, no serious and effective investigation has been conducted to identify those responsible. Based on the aforementioned, they asked the Court to declare that the State was responsible for the violation of Article 11 of the Convention and Article 7 of the Convention of Belem do Pará to the detriment of Mrs. Fernández Ortega.

95. Mexico regretted “the consequences of a rape for both the victims and their close family members. However, [...] neither the crime nor those responsible for it have been proven, hence the State cannot acknowledge and accept that the rights to personal integrity and to honor and dignity [...] have been violated to the detriment of Mrs. Fernández Ortega.” It considered that, “the obligation to prove that Mrs. Fernandez Ortega was raped by agents of the State, [...] depends on the elements of proof that the Commission [...] and the other petitioners present, given that these parties sustain their allegations with evidence, which to date is improperly substantiated, and as a consequence, makes it unviable for the burden of proof to fall on the State. Similarly, it considered that based on what the Commission and the petitioners have stated, “it cannot be implied or inferred that there were sufficient elements to corroborate the existence of a situation of real and imminent risk to the life or safety of Mrs. Fernández Ortega at the time the facts she denounced occurred,” or that “the motive for the alleged conduct was to send a message to [her or to] her community.”

96. Specifically, in regard to the evidence of rape, the State noted that: i) the statements of the alleged victim did not constitute sufficient proof, rather it has to be associated with other elements; ii) the arguments of other alleged rapes are not related to this specific case and have not been duly proven; iii) the reason for which the evidence went missing has been explained and thus cannot lead to a logical conclusion that attributes responsibility to the State, and iv) the testimonials, statements, and expert opinions of individuals who affirm that Mrs. Fernández Ortega was raped by officials of the Mexican Army cannot be considered by the Court, given that the individuals were not direct witnesses of the facts. In addition, it stated that National Human Rights Commission reported that there is no evidence to deem the Army responsible. In the briefs presented to the Court by the State, it assess all the information related to the activities of the battalion that fought against crime in the area where the facts took place, its mission, orders, objectives, as well as its geographic location, parameters of georeference, motion control logs of this platoon and its coordinates, and even an expert opinion. This information proves that there were no soldiers in the area where the facts allegedly took place.

97. Notwithstanding the aforementioned, in regard to the classification of the rape as torture, the State indicated that, since the perpetrators of the acts that she allegedly suffered had not been identified, it cannot be “affirmed that State agents were involved.” It added that “an attempt is being made to confuse the Court by indicating that a rape, in and of itself, constitutes torture.” To be able to classify an act as torture, a detailed analysis must be made of the circumstances in which the conduct occurred, the purpose for which it was perpetrated, the degree of severity, and the real consequences.

98. Finally, in regard to the alleged violation of the right to honor and dignity, the State emphasized that, “during the investigation of the facts reported by Mrs. Fernández Ortega, no evidence was found that revealed or suggested acts of public disrespect, persecution, discrimination, false accusations, or threats committed by State agents against the alleged victim or her family.” To the contrary, the alleged victim and her family “possess all the remedies established in domestic law to denounce possible accusations or threats; also, [the State] has put in place, the necessary measures for the protection of [Mrs. Fernández Ortega] and her family, such as the provisional measures that are in force.”

99. Based on the foregoing, it asked the Court to declare that “the State cannot be attributed directly or indirectly with international responsibility for the violation of the rights to personal integrity [...] or to honor and dignity [...] to the detriment of Mrs. Fernández Ortega,” recognized in Articles 5 and 11 of the American Convention. Likewise, since “constituent elements have not been provided to conclude that, in the present case, Mrs. [...] Fernández Ortega was the victim of an act of torture,” the State asked that the Court determine “the inexistence of violations to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.” In addition, it requested that the Court recognize its compliance with the right to guarantee the rights established in the American Convention and the other Inter-American instruments.

C. Evidence of rape against Mrs. Fernandez Ortega

i) Statement of Mrs. Fernandez Ortega

100. First, the Court finds it evident that rape is a special type of violence, which is generally characterized as taking place in the absence of persons other than the victim and the aggressor or aggressors. In view of the nature of this type of violence, one cannot await graphic or documentary evidence, thus the victim’s statement becomes the fundamental proof of that which occurred.

101. The alleged victim testified about the facts on several occasions, at both the domestic level and in the proceedings before the Inter-American system. On March 24, 2002, Mrs. Fernández Ortega filed a criminal complaint before the Public Prosecutor’s Office and on April 18, 2002, she expanded her complaint (supra paras. 85 and 87). Furthermore, on March 25, 2002, she filed a complaint before the Guerrero Human Rights Commission. [FN87] Subsequently, on August 14, 2009, Mrs. Fernández Ortega again expanded her statement, in writing and orally, before the Public Prosecutor’s Office of the Special Prosecutor for the Investigation of Sexual

Offenses and Domestic Violence of the State of Guerrero. [FN88] Lastly, on March 19, 2010, she gave a sworn statement before a public notary for this Court [FN89] in which she stated:

On the twenty-second day of March, two thousand and two, at around three in the afternoon, I was at home with my children [...] in the kitchen [...] when about eleven armed and uniformed soldiers approached along the path[;] three [of them ...] entered my house without my permission and asked me where did your husband steal the meat from; are you going to tell us or not. As I don't know much Spanish and was very frightened, I couldn't say anything; the three therefore pointed their rifles at me and one of them asked me again loudly whether I was going to tell them from where my husband had stolen the meat. Then one of the guachos [(soldiers)] [...] grabbed my hands and told me to lie down on the floor, pointing his rifle at me and, since he was aiming at me, I was afraid and laid down on the floor near the door; then the other soldier [...] grasped my hands with his right hand and put his left hand under my skirt and lifted it up, seized the right-hand side of my underpants and pulled them down and took them off. He then dropped his pants to his knees and lay on top of me and sexually abused me against my will.

[FN87] Cf. Recommendation No. 048/2003 issued by the National Human Rights Commission (case file of annexes to the application, annex 20, tome II, folio 572), and brief of nonconformity presented by Mrs. Fernandez Ortega before the Military Public Prosecutor's Office adjoined to the 35th Military Zone (file of annexes to the application, annex 14, tome II, folio 413 and 414). This description of the facts of March 22, 2002 coincides with the narration of antecedents of the acts claimed and presented by Mrs. Fernández Ortega in her Petition for relief [Amparo] number 405/2002 before the First District Judge in the state of Guerrero on February 9, 2003 (File of annexes to the application, annex 115, tome II, folio 433 and 434).

[FN88] Cf. Appearance before the Agent of the Special Prosecutor's Office of Sexual Offenses and Domestic Violence of the state of Guerrero, expansion of the ministerial declaration and ratification of the brief of Mrs. Fernández Ortega before the Agent of the Public Prosecutor's Office of the Federation of the Special Prosecutor's Office for Crimes of Violence against Women and Human Trafficking on August 14, 2009 (case file of annexes to the answer to the application, tome V, folios 8213 and 8216).

[FN89] Cf. Statement of Mrs. Fernandez Ortega before a public notary, supra note 62, folios 1483 and 1484.

102. From the different statements made by Mrs. Fernández Ortega some differences can be noted in the narration of the events, particularly with regard to how the rape occurred. In the report of the incident before the Public Prosecutor's Office and in her statement before the public notary for this Court (supra paras. 85 and 28), she indicated that she had been raped by one soldier in the presence of two others. In the first written expansion of this complaint before the Public Prosecutor's Office (supra para. 87), she indicated that three soldiers "raped" or "sexually abused" her.

103. As a starting point, the Court considers it convenient to highlight that in regard to the international responsibility of the State, the fact that it was one or several state agents who raped Mrs. Fernandez Ortega is irrelevant. This Court reiterates that the determination of individual

responsibility does not pertain to the Court, [FN90] but rather to the competent domestic courts, yet it is the Court's responsibility to acknowledge the facts brought to its attention and to classify them in the exercise of its contentious jurisdiction, pursuant to the evidence presented by the parties. [FN91]

[FN90] Cf. Case of Velásquez Rodríguez. Merits, *supra* note 27, para. 134; Case of Anzualdo Castro v. Perú. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 22, 2009. Series C No. 202, para. 36, and Case of Manuel Cepeda Vargas, *supra* note 18, para. 41.

[FN91] Cf. Case of Cantoral Huamaní and García Santa Cruz v. Perú. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, para. 87; Case of Kawas Fernández v. Honduras. Merits, Reparations, and Costs. Judgment of April 3, 2009. Series C No. 196, para. 79, and Case of Manuel Cepeda Vargas, *supra* note 18, para. 41.

104. On the other hand, in regard to the content of the statements made by Mrs. Fernandez Ortega, the Court considers that it is not unusual that the retelling of acts of this nature contain some aspects that could be considered, *a priori*, imprecision in the reporting. It is not the first time that an international human rights court should note possible differences in the statements of individuals relating the sexual abuse of which they have been victims. [FN92]

[FN92] Cf. ECHR, Case of Aydin v. Turkey (GC), Judgment of 25 September 1997, App. No. 57/1996/676/866, paras. 72 and 73.

105. The Court notes that Mrs. Fernández Ortega speaks Me'paa, and to be understood by the government employee who received her complaint, she had to be assisted by someone who was not a professional interpreter. Other narrations of the events, such as the expansion of the complaint, were made by submitting a written brief and not by the direct testimony of the alleged victim. Since Mrs. Fernández Ortega's mother tongue is not Spanish, it is evident that, although she signed them, the documents were drafted by a third person, who also had to reproduce in Spanish what she stated in Me'paa, or to write what the person interpreting into Spanish indicated, a circumstance that also can undoubtedly lead to lack of precision. As a consequence, the differences in the story, rather than relating to a problem of consistency, may be due to the alleged victim's difficulties in expressing herself or to the intervention of third parties, or result from the use of different languages or interpretations in the translations. Besides, the incident described by Mrs. Fernández Ortega relates to a traumatic experience suffered by her, the impact of which may mean that certain imprecision will arise upon recalling the facts. Moreover, the statements were made at different times between 2002 and 2009.

106. Nevertheless, after reading said statements, the Court finds that the differences in her story are not substantial. It can be seen that Mrs. Fernández Ortega used the expression "they raped me," and refers to an act as "rape" or "sexual abuse," indistinctly, to refer to the whole injurious incident, without identifying those terms, exclusively, with the act of sexual

penetration. Thus, similarly, she indicates at different times that it was one or three soldiers that raped her. A clear example of this dual use of the concept of rape by Mrs. Fernández Ortega can be seen in her August 14, 2009 expansion of the complaint before the Civil Public Prosecutor's Office (*supra* para. 101), where she stated "the men who raped me are members of the Mexican Army," and immediately after in that same statement, she indicated "I saw them close up, especially the one who raped me, because he was on top of me." Hence, the Court finds that this is a turn of phrase or use of language rather than a factual inconsistency with regard to the facts, and that, in reality, it only appears to be a discrepancy and does not impair the credibility of her statement.

107. In addition, the Court has not found elements of Mrs. Fernández Ortega's inherent situation that would impair the credibility of her statements. The alleged victim is an indigenous woman, who lives in an isolated mountainous area, who had to walk several hours to file a complaint about a rape that would, in all probability, have negative repercussions in her social and cultural medium – such as possible rejection by her community – before justice and health care authorities who did not speak her language. In this sense, she pressed charges and was persistent with her claim, knowing that in the area in which she lives there is a continuing presence of soldiers, some of whom had been criminally charged with committing a serious crime.

108. In synthesis, the Court concludes that Mrs. Fernández Ortega's different versions of her story consistently reveal the following facts: i) on March 22, 2002, she was at home with her four children; ii) at approximately three in the afternoon, three armed members of the Army entered her home without her consent, while other soldiers remained outside the house; iii) those who entered pointed their rifles at her, asking her to give them certain information which was unanswered, and iv) in this context of considerable coercion, alone and surrounded by three armed soldiers, she was obliged to lie down on the ground, and while one of the soldiers raped her, the other two observed the perpetration of the rape.

ii) Military presence in the area on the day of the incident

109. First, despite that indicated by the State (*supra* para. 96), the Court finds that it has been proven that there was a military presence in the area at the time of the incident. The case file of the present case contains statements by infantry soldiers, taken during the Preliminary Investigation 35ZM/06/2002, on April 1, 2002, from which it is clear that the "Méndez" Operations Base, belonging to the 41st Infantry Battalion of the Mexican Army, was located about three kilometers from Barranca Tecoani. [FN93] Moreover, the Court finds that it has been proven that, on March 22, 2002, a group of soldiers made reconnaissance near Barranca Tecoani, returning to their base at approximately four in the afternoon, [FN94] in other words, one hour after the incident.

[FN93] Cf. Statements of nine infantry soldiers, four corporals of the infantry and one sublieutenant of the infantry before the Military Public Prosecutor's Office on April 1, 2002 (case file of annexes to the petition, tome III, folios 1628, 1634, 1642, 1648, 1654, 1659, 1665, 1671, 1677, 1693, 1700, 1717, 1750, and 1762).

[FN94] Cf. Statements of ten infantry soldiers, four corporals of the infantry and one sublieutenant of the infantry before the Military Public Prosecutor on April 1, 2002 (case file of annexes to the petition, tome III, folios 1635, 1641, 1648, 1654, 1660, 1665, 1671, 1676, 1693, 1699, 1710, 1727, 1744, 1756, and 1762).

110. For its part, in its Recommendation 046/2003 concerning this case, the National Human Rights Commission did not address responsibility regarding the rape, but rather took as affirmed that from the attestations in the case file “one fact [among others] is clear: that personnel of the Méndez Operations Base of the 41st Infantry Battalion of the Mexican Army were present at the time and in the place.” [FN95]

[FN95] Cf. Recommendation No. 048/2003 issued by the National Human Rights Commission, supra note 87, folio 578).

iii) Expert evidence and loss of evidence in State custody

111. In addition to the statements of the alleged victim, the official expert studies for the presence of sperm and acid phosphates studies concluded “the presence of seminal liquid on the two swabs obtained and [...] identified sperm cells.” [FN96]

[FN96] Cf. Forensic Chemistry Report No. PGJE/DSGP/XXVI-II/305/02, supra note 84, folio 7830.

112. However, even though seminal liquid and sperm cells had been found, the samples were inexplicably used up or thrown away by the expert officials, preventing other tests from being carried out; some of them of fundamental importance, for example, DNA. This fact, acknowledged by the State (supra paras. 16 and 18), which the Court considers extremely serious, has obstructed the judicial determination and clarification of the facts to date. In this regard, the Court has indicated that, in principle, the burden of proof regarding the facts on which the complaint is based corresponds to the petitioner. Nevertheless, it has underscored that, contrary to domestic criminal law, in proceedings on human rights violations, the State’s defense cannot be based on the impossibility of the petitioner to provide evidence, when it is the State that controls the means to ascertain facts that occurred on its territory. [FN97] In this case, the failure to clarify the facts responds, above all, to the destruction of this fundamentally important evidence, while in the custody of the State.

[FN97] Cf. Case of Velásquez Rodríguez. Merits, supra note 27, para. 135; Case of Escher et. al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para. 127, and Case of Radilla Pacheco, supra note 33, para. 89.

iv) Other persuasive elements

113. On the other hand, the Court also finds that the credibility of Mrs. Fernández Ortega's story appears to be supported by other persuasive elements. In its Recommendation 048/2003, the National Human Rights Commission referred to the existence of a psychiatric certification issued by a medical expert adjoined to that State agency, "which indicates that the victim was exposed to a traumatic event." [FN98] Moreover, a 2009 psychological report of Mrs. Fernandez Ortega concluded that "the facts narrated [...] concerning the rape are coherent with the psychological symptoms suffered, because such symptoms are emotional reactions typical of a victim of rape by a person in authority." [FN99] The State contested, generally, the latter document in its response to the application, noting that "its content is not related to the [litis] of the case." Nevertheless, the Court notes that it relates to a psychological evaluation of Mrs. Fernandez Ortega regarding the impact the facts of the case had on her. As a consequence, the Court does not find that the evidence asserted in said psychological evaluation, nor that noted in Recommendation 048/2003 to be discredited, nor the authenticity of said documents to be in question.

[FN98] Cf. Recommendation No. 048/2003 issued by the National Human Rights Commission, supra note 87, folio 578.

[FN99] According to that indicated by the report, the intervening psychologist carried out a follow-up on Mrs. Fernández Ortega's state since 2006 until the issuance of the report in 2009, and in order to carry out said evaluation, she met with the patient 30 times, cf. Assessment of psychological impact, supra note 30, folio 5697.

114. In addition, the Court has the statement of Mrs. Fernández Ortega's daughter, Noemí Prisciliano Fernández, which is consistent with what she indicated about the moment before and after the rape. [FN100] Similarly, the Court has the statements of Mr. Prisciliano Sierra, Mrs. Eugenio Manuel, Mr. Lugo Cortés, and Mr. Ramirez Rodríguez who, although they did not witness the incident, were present shortly afterwards and assisted the alleged victim as soon as they learned of what had happened. Their testimony reveals that when they first saw the alleged victim after the event, they found her unwell, sad, upset, with aches and pains and, when the victim told them what had happened, she indicated that she had been raped and that those responsible were soldiers. [FN101]

[FN100] Cf. Noemí Prisciliano Fernández stated: "I was in the house with my mother [...] when [three] soldiers arrived [...] I was afraid and left running [with my three siblings] to the [home of] my grand[pa], and [once in his house], we locked ourselves in because my grand[pa] was also scared," statement of Noemí Prisciliano Fernández before the Common Public Prosecutor's Office, supra note 83, folio 4401. She further stated, "a good deal of time had passed when I left my grand[pa's] house and went to my house and when I got there, I saw my mom crying." She stated, "[t]he three soldiers that first got there entered, were the firepit is, and they went to where my mother was and my three siblings and it was then that they attacked my mother [...] I did not

know what was happening, but I remember that they first took off her dress, and then one of them took off his pants, and he hit my mother with his hand, while the other soldiers kept their weapons pointed at her. Then, my brothers and I were really afraid [...] and that is why we left running to my grandparents house.” Lastly, she stated: “[b]ecause I was so worried about my mother, after a while I went back to the house. [...] After they left, together with my grandpa and siblings, we went to where my mother was and she was laying and crying because of what the soldiers did.” Sworn statement of Noemí Prisciliano Fernández before a public notary, supra note 68, folios 1492 and 1493.

[FN101] Cf. Mr. Fortunato Prisciliano Sierra stated: “[o]n March 22, 2002, [...] I was working on the plot of land [...] and returned from work at around four in the afternoon, [...] and when I entered the house, I saw my wife crying, and I asked her what had happened, she told me that when I was gone, three soldiers came into the house from the kitchen and raped her while eight other soldiers stole the meat, and that they threatened her with their weapons.” He also stated: “[o]n March 23, 2002, I went walking to Ayutla, [...] to look for help [...] in the OPIMT offices, and there I met with Otilia Eugenio Manuel and Cuauhtémoc Ramírez Rodríguez, whom I first told that [my wife] was very sick and asked if they could help me transport her, but because they began to ask a lot of questions, with a lot of embarrassment, I had to tell them that the [soldiers] raped her, and that is why she was sick,” Sworn statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folios 1500 and 1501. Mr. Cuauhtémoc Ramírez Rodríguez stated: “[i]n regards to the rape, I knew what had happened, given that on March 23, 2002, in the morning [Mrs. Fernandez Ortega’s] husband, came down to Ayutla to meet with me and Otilia Eugenio Manuel [...] There, I recall that he stated [Mrs. Fernandez Ortega] was sick, but since we saw that he was so mad and distressed, we began to ask him questions, and he ended up telling us that [Mrs. Fernandez Ortega] had been raped by soldiers.” Moreover, he stated that on March 23, 2002, “[w]hen we finally arrived with Fortunato to his home [in Barranca Tecuani], we saw that [Mrs. Fernández Ortega] was laying down, very fragile, very hurt and in much pain,” Sworn statement of Mr. Ramírez Rodríguez before a public notary, supra note 72, folio 1510. Mr. Lugo Cortés stated: “[s]he was laying and my first impression was that she was very physically and emotionally hurt, completely overwhelmed by what had occurred [...] she had the strength to narrate the facts to me and to affirm that, in effect, she was raped by members of the Mexican Army. At that time, Mrs. Fernandez [Ortega] told me that on March 22, 2002, she was raped in her home and that those responsible were soldiers,” statement of Mr. Lugo Cortés before a public notary, supra note 67, folio 1532. Mrs. Otilia Eugenio Manuel stated: “[r]egarding what happened, I found out when her husband [Mr. Prisciliano Sierra] went down to Ayutla to the organization’s office on March 23, to talk with me and with Cuauhtémoc Ramírez. At first, he did not want to say anything and he only said that [Mrs. Fernández Ortega] was very sick [...] Later he told us what had happened. When we arrived in Barranca Tecoani, we went directly to [Mrs. Fernández Ortega’s] home. I saw that she was in very bad shape. She was laying down, very sad, and she looked very injured. She told me that some [soldiers] had raped her, there in her home,” sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1598.

115. On the other hand, the Court has no evidence that disproves what Mrs. Fernandez Ortega has said. With regard to the medical examinations, it should be emphasized that the alleged victim only received medical assistance on one occasion after reporting the facts, from a general

practitioner, [FN102] who performed a physical and gynecological examination from which she determined that “there was no evidence of violence”. [FN103] In this regard, the Court observes that the medical certificate concurs with the different statements made by Mrs. Fernández Ortega, because, in none of them, the alleged victim says that she opposed physical resistance to the attack. In this regard, the Court notes that international jurisprudence has established that the use of force cannot be considered an essential element to punish non-consensual sexual acts, and that evidence of the existence of physical resistance to such acts cannot be required; rather it is sufficient that there are coercive elements in the conduct. [FN104] In this case, it is established that the act was committed in a situation of extreme coercion, aggravated by the fact that it occurred in a context of power subjectification by three armed soldiers.

[FN102] Cf. Order No. 0176/02 issued by the director of the General Hospital de Ayutla, supra note 81, folio 400.

[FN103] Cf. Medical note on March 25, 2002, supra note 82, folio 398.

[FN104] Cf. ECHR, Case of M.C. v. Bulgaria, Judgment of 4 December 2003, App. No. 39272/98, para. 166, e ICTY, Case of Kunarac et al. "Foča" (Prosecutor v. Kunarac, Kovac and Vukovic). Judgment of 22 February, 2001. Case No. IT-96-23-T & IT-96-23/1-T, paras. 452 and 464.

116. More than eight years after the incident occurred, the State has not provided any evidence in the proceedings in this case that contradicts the fact that Mrs. Fernández Ortega was raped. In this regard, the Court finds that the burden falls on the State to disprove the accusations concerning its responsibility, and it cannot justify itself based, exclusively, on the uncertainty of whether the rape occurred and its authorship, when this results from errors or shortcomings when under it’s custody. To conclude the contrary would entail allowing the State to shield itself in the negligence and ineffectiveness of the criminal investigation in order to ignore its responsibility for the violation of rights established in the American Convention. [FN105] Based on the abovementioned, the Court finds it proven that Mrs. Fernández Ortega was the victim of a rape, committed by a soldier in the presence of two other soldiers that observed the perpetration of the rape, while she was in her own home.

[FN105] Cf. Case of Kawas Fernández, supra note 91, para. 97.

D. Juridical classification of the facts related to the rape

117. Since the Court has found it proven that Mrs. Fernández Ortega was the victim of acts of sexual violence committed by State agents, it must decide how this should be classified from a juridical point of view.

118. The Court recalls, as indicated by the Convention of Belém do Pará, that violence against women constitutes not only a violation of human rights, but is “an offense against human dignity and a manifestation of the historically unequal power relations between women and men,” that

“pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation.” [FN106]

[FN106] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. Preamble.

119. The Court, following international jurisprudence and taking into account the provisions of the said Convention, has considered previously that sexual violence is committed by means of acts of a sexual nature, committed on a person without their consent and that in addition to involving physical invasion of the human body, may include acts which do not involve penetration or even any physical contact. [FN107] Sexual abuse constitutes a paradigmatic form of violence against women, the consequences of which even transcend the personhood of the victim.

[FN107] Cf. Case of the Miguel Castro-Castro Prison v. Perú. Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C No. 160, para. 306.

120. The Court will examine whether the facts of the present case can be subsumed in the crime of torture, as affirmed by the Inter-American Commission and the representatives. In this sense, the Court recalls that, in *Bueno Alves v. Argentina*, [FN108] pursuant to the definition established in the Inter-American Convention to Prevent and Punish Torture, it understood that it is confronted with an act of torture when the mistreatment is: i) intentional; ii) causes severe physical or mental suffering, and iii) is committed with any objective or purpose.

[FN108] Cf. Case of *Bueno Alves v. Argentina*. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 164, para. 79.

i) Intentionality

121. Regarding the existence of an intentional act, from the evidence in the case file it has been verified that the mistreatment was inflicted deliberately against the victim. Indeed, the Court considers it proven that one of the attackers took Mrs. Fernández Ortega by the hands, obliged her to lie down on the floor and, while rifles were pointed at her, penetrated her sexually while the other two observed the perpetration of the rape.

ii) Severe physical or mental suffering

122. In order to analyze the severity of the victim’s suffering, the Court must take into account the specific circumstances of each case. As such, characteristics of the action, the duration, the method used, or the way in which the suffering was inflicted, the potential physical and mental

effects, and also the status of the person who endured this suffering, including their age, gender, and physical condition, among other personal details, must be considered. [FN109]

[FN109] Cf. Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 74, and Case of Bueno Alves, supra note 108, para. 83.

123. Regarding the physical suffering, the Court recalls that a medical certificate issued three days after the incident indicated that there was no evidence of physical injuries (supra para. 86). However, the Court also has testimonial evidence indicating that the day following the incident Mrs. Fernández Ortega was sore and had physical aches and pains, and even summoned the assistance of a private physician (supra para. 84). [FN110]

[FN110] Cf. Statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folios 1500 and 1501; sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152; sworn statement of Mr. Ramírez Rodríguez before a public notary, supra note 72, folio 1510; sworn statement of Mr. Lugo Cortés before a public notary, supra note 67, folio 1532, and sworn statement of Noemí Prisciliano Fernández before a public notary, supra note 68, folio 1494.

124. Regardless of the above, in previous cases, the Court has established that an act of torture can be perpetrated both by acts of physical violence and by acts that produce acute mental or moral suffering for the victim. [FN111] In addition, this Tribunal has recognized that rape is an extremely traumatic experience that can have severe consequences and cause significant physical and psychological damage that leaves the victim “physically and emotionally humiliated,” a situation that is difficult to overcome with the passage of time, contrary to other traumatic experiences. [FN112] This reveals that the severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. Indeed, the aftereffects of rape will not always be physical injuries or disease. Women victims of rape also experience complex consequences of a psychological and social nature.

[FN111] Cf. Case of Cantoral Benavides v. Perú. Merits. Judgment of August 18, 2000. Series C No. 69, para. 100, and Case of Maritza Urrutia v. Guatemala. Merits, Reparations, and Costs. Judgment of November 27, 2003. Series C No. 103, para. 91.

[FN112] Cf. Case of the Miguel Castro-Castro Prison, supra note 107, para. 311. Cf. also ECHR, Case of Aydın v. Turkey (GC), supra note 92, para. 83.

125. In the present case, Mrs. Fernández Ortega was subject to an act of sexual violence and physical control by a soldier who penetrated her intentionally. Her vulnerability and the coercion that the agent of the State exercised over her was enhanced by the participation of the other two

soldiers, who were also armed, which exacerbated the context of sexual violence perpetrated against the victim, and there was even another group of soldiers who were waiting outside the house. The Court finds it evident that the suffering endured by Mrs. Fernández Ortega, by being obliged to undergo a sexual act against her will, event that was observed by two other individuals, was extremely intense. This psychological and moral suffering was aggravated in view of the circumstances in which the rape occurred, because she could not ignore the likelihood that the violence suffered could be further increased by the State agents who witnessed the rape and those outside of the house, owing to the possibility that they could also rape her. In this same sense, the presence of her children at the moment prior to the facts, as well as the uncertainty of whether they remained in danger or had escaped, intensified the suffering of the victim.

126. In this sense, the expert witness, Correa Gonzalez, referred to the vulnerable and humiliating situation in which the victim found herself and the emotional impact resulting from the fact that her children were present until the moment prior to the rape and that the perpetrators were soldiers, because “for her, they represented authority figures, and this did not allow her to assess the danger implied by their presence.” The presence of the other two soldiers “increase[d] the level of vulnerability and humiliation and made her feel completely powerless and totally unable to react.” In addition, the expert witness also referred to the psychosomatic effects of the rape. [FN113] On her behalf, the expert Hernandez Castillo noted that according to her indigenous worldview, this suffering was experienced as a “loss of the spirit.” [FN114]

[FN113] Cf. Psycho-social expert opinion by expert Mrs. Correa González at the public hearing (case file on the merits, tome IV, folios 1612 and 1613).

[FN114] Opinion by expert Hernandez Castillo at the public hearing at the Inter-American Court on April 15, 2010.

iii) Purpose

127. The Court considers that, in general terms, rape, as in the case of torture, has other objectives, including intimidating, degrading, humiliating, punishing, or controlling the person who undergoes it. [FN115] The rape of Mrs. Fernández Ortega occurred in the context of a situation in which the soldiers were questioning the victim and did not obtain a response to the information they required (supra paras. 82 and 108). Without denying the possibility that there were also other objectives, the Court considers it proven that, in the present case, the rape had the specific purpose of punishing the victim because she failed to provide the required information.

[FN115] Cf. ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment of September 2, 1998. Case No. ICTR-96-4-T, para. 597, and CAT, Case V.L. v. Switzerland, Decision of 22 January 2007, U.N. Doc. CAT/C/37/D/262/2005, para. 8.10.

128. On the other hand, this Court finds that rape may constitute torture even when it is based in a single fact alone and takes place outside State facilities, [FN116] such as in the victim's home. This is so because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act, requisites that, in the present case, have been fulfilled. Based on the aforementioned, the Court concludes that the rape in the present case entailed a violation of the personal integrity of Mrs. Fernández Ortega, constituting an act of torture in the terms of Article 5(2) of the American Convention and Article 2 of the Inter-American Convention to Prevent and Punish Torture.

[FN116] Cf. CAT, Case V.L. v. Switzerland, supra note 115, para. 8.10.

129. Regarding the alleged violation of Article 11 of the American Convention based on the same facts, the Court has specified that, even though this provision is entitled "Right to Privacy" [Note: it is entitled Protection of Honor and Dignity in Spanish], its contents include, inter alia, the protection of private life. [FN117] Moreover, the concept of private life is a wide-ranging term, which cannot be defined exhaustively, [FN118] but includes, among other protected forums, sexual life, [FN119] and the right to establish and develop relationships with other human beings. [FN120] The Court finds that the rape of Mrs. Fernández Ortega violated essential aspects and values of her private life, represented an intrusion in her sexual life, and annulled her right to decide freely with whom to have intimate relations, causing her to lose total control over these most personal and intimate decisions, and over her basic bodily functions. [FN121]

[FN117] Cf. Case of the Ituango Massacres v. Colombia. Preliminary Exceptions, Merits, Reparations, and Costs. Judgment of July 1, 2006, Series C No. 148, para. 193; Case of Tristán Donoso v. Panamá. Preliminary Exceptions, Merits, Reparations, and Costs. Judgment of January 27, 2009. Series C No. 193, para. 55, and Case of Escher et al., supra note 97, para. 113.

[FN118] Cf. ECHR, Case of Niemietz v. Germany, Judgment of 16 December 1992, App. No. 13710/88, para. 29, and Case of Peck v. United Kingdom, Judgment of 28 January 2003, App. No. 44647/98, para. 57.

[FN119] Cf. ECHR, Case of Dudgeon v. the United Kingdom, Judgment of 22 October 1981, App. No. 7525/76, para. 41, and ECHR, Case of X and Y v. the Netherlands, Judgment of 26 March 1985, App. No. 8978/80, para. 22.

[FN120] Cf. ECHR, Case of Niemietz v. Germany, supra note 118, para. 29, and ECHR, Case of Peck v. United Kingdom, supra note 118, para. 57.

[FN121] Cf. ECHR, Case of M.C. v. Bulgaria, supra note 104, para. 150, and ICTY, Case of Mucic et. al. "Celebici Camp". Judgment of November 16, 1998. Case No. IT-96-21-T, para. 492

130. As indicated previously, the Committee for the Elimination of Discrimination against Women has stated that the definition of discrimination against women "includes gender-based violence, that is, violence that is directed against a woman [i] because she is a woman or [ii] that

affects women disproportionately.” Furthermore, it has also indicated that “[v]iolence against women is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.” [FN122]

[FN122] Case of González et al., (“Cotton Fields”), supra note 15, para. 395

131. Based on the foregoing, the Court concludes that the State is responsible for violating the rights to personal integrity and to personal dignity and private life embodied in Articles 5(2) and 11(1) and 11(2) of the American Convention, in relation to Article 1(1) thereof, and Articles 1, 2, and 6 of the Inter-American Convention to Prevent and Punish Torture, as well as for the failure to comply with the right enshrined in Article 7(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women to the detriment of Mrs. Fernández Ortega.

132. On the other hand, the Court finds that it is not necessary to rule on other allegations based on the same facts. Furthermore, a possible violation of the American Convention in relation to the alleged flaws in the investigation of the facts of the present case will be analyzed in Chapter IX of this Judgment, corresponding to Articles 8 and 25 of that Convention.

E. Personal Integrity of Mrs. Fernandez Ortega and her next of kin

i) Personal Integrity of Mrs. Fernandez Ortega

133. The Commission stated that Mrs. Fernández Ortega reported to the authorities despite the cultural, economic and social, as well as language barriers, that she was the victim of a rape. Since she filed her complaint, she has faced resistance, silence, negligence, harassment, fear, revictimization, a forum that lacks jurisdiction and interest in seeking those responsible, among many other obstacles, faced in her search for justice. The lack of clarity regarding the facts and the resulting impunity, emphasized the discrimination, subordination, and racism against the alleged victim and delegitimized her before members of her community. The State’s response has caused emotional harm to her as well as to her family and constitutes humiliation and degradation in violation of the right to personal integrity and private life. The investigation methods of the military forum and the lack of protection revictimized Mrs. Fernández Ortega in contravention of the Convention of Belém do Pará, a situation compounded by her condition as an indigenous women and her lack of knowledge of the language. Based on the abovementioned, it asked the Court to declare the State responsible for violation of Article 5(1) and 11 of the American Convention, to the detriment of Mrs. Fernández Ortega, in relation with Article 1(1) of that instrument, due to the hardship suffered from the inadequate investigation carried out by state authorities.

134. On its behalf, the representatives agreed with the Commission regarding the violation of the right to personal integrity to the detriment of Mrs. Fernández Ortega for the impunity in which the case remains, whose investigation has lasted more than eight years, thus prolonging her suffering and deepening the wound left by the facts of the rape. They indicated that the

victim has experienced feelings of despair and has lost confidence in the State, which has not attended to her call for justice but has protected the military, allowing the investigation to be carried out by the same institution allegedly responsible for the facts. Moreover, the opportunity to appear before the military “caused her a considerable level of anxiety and distress.” Therefore, the representatives asked the Court to declare that the State “is responsible for the violation of the victim's right to personal integrity for the suffering caused as a result of the state of absolute impunity which remains of the assault inflicted upon her,” taking into account “the indigenous world view and the effects these events have caused in the community as a whole.”

135. At the public hearing and in its final written arguments, Mexico recognized that “the delay in medical care [...], the loss of gynecological tests, and the delay in investigation of the facts of the case, are a violation of Articles 8(1) and 25 of the American Convention, and as a consequence, also of Article 5(1) of the same instrument, regarding the psychological integrity of Mrs. Fernández Ortega.

136. The Tribunal accepted the recognition of international responsibility of the State in regard to the violation of the right to personal integrity to the detriment of Mrs. Fernández Ortega, in relation to the recognized violations of Articles 8(1) and 25 of the American Convention (*supra* paras. 21 to 25).

137. The Court also notes that from the testimony of Mrs. Fernández Ortega, indications of the damage to her personal integrity are evident and related to the treatment she received by filing a claim before the authorities, [FN123] as well as feelings of deep fear caused by military presence and the powerlessness related to the lack of justice in her case. [FN124]

[FN123] Mrs. Fernández Ortega stated: “[a]lmost all of them were men, there was no [female] doctor, nor a person who spoke Me’phaa to tell the lawyer in Spanish what I am testifying[,] but there wasn’t a female doctor, [...] only a man and he told me he was going to check me, but I refused, I had already suffered so much giving my statement where everyone was listening to me to then be seen by a doctor. I remember well how the doctor from the public prosecutor told me “why don’t you want me to examine you, if they weren’t women who raped you, they were men, why don’t you let me examine you,” sworn statement of Mrs. Fernández Ortega before a public notary, *supra* note 62, folios 1485, and sworn statement of Mr. Lugo Cortes before a public notary, *supra* note 67, folios 1533 and 1534.

[FN124] Mrs. Fernandez Ortega declared: “[w]hen I think about what happened to me, I feel very bad because the authorities have also not given me justice, with so much work, walking, being hungry, spending, and with shame, I have gone all the way to Ayutla so that justice is rendered, but nothing has been done. I have looked everywhere, but no one from the government does anything. They have never accepted that it was soldiers who raped me, everyone doubts me, and they do not believe my statement and that is why they do not render justice.” Likewise, she stated “[I] did not feel well and was afraid, but I wanted the complaint to continue because what they did to me was not OK” and she added “[e]ach time we returned from Ayutla there were many problems, because my children staid alone, and I was afraid [...] that more [soldiers]

would come and do something to them. In addition, we didn't even have money to be going and we would not take good care of the parcel and the animals." Finally, she stated "[i]f the Public Prosecutor of Ayutla[,] who is not a soldier[,] did not treat me well or believe me, how would it be with the military if it was [those] who raped me. [...]I got very sad when they told me that my case was going to be taken by the same [soldiers] that raped me because then there would be no one responsible, because they would not accuse each other, and that is why I thought about abandoning my case, and I did not want to do anything anymore," sworn statement of Mrs. Fernández Ortega rendered before the public notary, supra note 62, folios 1486 a 1488.

138. In view of the aforementioned and taking into account the recognition of State responsibility, the Court declares that Mexico violated the right to personal integrity of Mrs. Fernández Ortega enshrined in Article 5(1) of the American Convention, in relation with Article 1(1) of the same.

ii) Personal integrity of the next of kin of Mrs. Fernández Ortega

139. The Commission noted that the personal integrity of the next of kin of Mrs. Fernández Ortega was affected due to the facts of the complaint and the actions and omissions of the authorities in the investigation of the same. For the Commission, "it is evident that a number of circumstances affected the members of [Mrs.] Fernández Ortega's family nucleus, such as the manner in which her children witnessed the rape and torture, the feelings of powerlessness and insecurity of [her] next of kin before the presence of the Mexican [A]rmy [...] in the area where they reside[,] and in their involvement in relationships with their own indigenous community, among others." Therefore, it asked the Court to declare that the State violated Article 5(1) of the American Convention, in relation with Article 1(1) thereof, to the detriment of the next of kin of Mrs. Fernández Ortega.

140. The representatives noted that the rape caused "deep suffering for the members of her family, which has worsened and has remained over the years due to the impunity of the case. Her husband, children, mother, and siblings have been victims of severe emotional damage which they have not been able to overcome." As for Mr. Prisciliano Sierra, the facts have caused him to have feelings of powerlessness, frustration, and anguish for not having been able to protect his wife and for the danger of another attack on his family by the military. This has also caused damage to his role within the community for maintaining a relationship with a woman who was another man's," for which "[Mr. Prisciliano Sierra's] honor was severely affected, because he felt unable to defend his wife in the role that society had assigned to him" and, moreover, the cultural stigma regarding women who have been raped also affected his reputation. Given his suffering, Mr. Prisciliano Sierra resorted to drinking and became more violent with his wife, thus affecting their relationship as a couple. Similarly, witnessing at a young age, the attack against their mother has resulted in "profound suffering and anguish" to the sons and daughters of Mrs. Fernández Ortega, whom have also suffered isolation and been called out in their community for being her children, and they have grown up in an atmosphere of violence against their mother because of the problems which the rape caused for the couple. In their final written arguments, the representatives, based on these same facts, requested the Court to declare a violation of Article 19 of the American Convention regarding the children of Mrs. Fernández Ortega.

141. In addition, the representatives indicated that the right to personal integrity of the mother and siblings of Mrs. Fernández Ortega were violated due to diverse forms of suffering, consequence of the rape of Mrs. Fernandez Ortega, and due to the impunity in which the facts remain. Regarding the siblings, they indicated that Mr. Lorenzo Fernández Ortega had a close relationship to the victim and “for his role in the filing of the complaint he was subject to a variety of threats and harassment[,] the most serious occurred on February 9, 2008, when he was cruelly tortured until murdered.” On the other hand, Mr. Oclotán Fernández Ortega, though very young when the events occurred, subsequently sought to establish a connection to the OPIM so as to complain and seek justice for his sister and other women, and this caused him to be the victim of surveillance and harassment which forced him to leave their community for fear of the threats materializing. On her behalf, the mother has suffered from all the multiple threats and the intimidation against her children. Aside from the pain caused by what happened to her daughter, given that she lives in a remote area, she was unable to be near her when the events occurred, and to make matters worse, Ms. Fernandez Ortega ceased visiting her mother for some time for fear that something would happen to her because of the military presence. Finally, the mother of Mrs. Fernández Ortega has been caring for the children so as to allow her daughter to carry out efforts to seek justice. Because of the aforementioned, the representatives requested the Court to declare a violation of the rights to personal integrity and honor and dignity, enshrined in Articles 5 and 11 of the Convention, to the detriment of the next of kin of Mrs. Fernández Ortega.

142. The State expressed regret for the consequences that a rape may cause close relatives; nevertheless, among other arguments, it said that neither the crime nor those responsible had been proven, and therefore, it can not recognize or accept that the rights to personal integrity and honor and dignity of the relatives of Mrs. Fernández Ortega have been violated (*supra* para. 95). Therefore, the State asked the Court to declare that the violation of the rights to personal integrity or honor and dignity to the detriment of the relatives indicated is not attributable to the State.

143. The Court has stated on other occasions that the next of kin of the victims of human rights violations may, in turn, be victims. The Court has held as violated the right to psychological and moral integrity of the next of kin of victims because of the additional pain they have suffered as a result of the particular circumstances of the violations perpetrated against their loved ones and because of the subsequent actions or omissions of State officials regarding the facts. [FN125]

[FN125] Cf. Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36, para. 114; Case of Radilla Pacheco, *supra* note 33, para. 161, Case of Chitay Nech et al., *supra* note 18, para. 220.

144. With respect to Mr. Prisciliano Sierra, the body of evidence shows that he suffered various encumbrances that were evinced as feelings of fear, anger, and distrust associated with

the pursuit of justice and impunity of the case. [FN126] Moreover, the Court does not find the damages alleged by the representatives regarding the reputation of Mr. Prisciliano Fernandez for the rape of his wife or those relating to the alleged noncompliance of an assigned social role to be attributable to the State (supra para. 140).

[FN126] Mr. Prisciliano Sierra declared “[when] they told us that the case was already with the [soldiers], that they were going to investigate it[, I] got very angry because I did not trust them to investigate.” Moreover, the pursuit of justice implied that they had to leave their community in such a way that “each time they left for Ayutla, they had to leave [their] children alone with the fear that something could happen to them.” Likewise, he noted that “we were always with fear that something would happen to us because we lived alone in a corner of Barranca Tecoani.” He also stated, “we are always afraid[.] I don’t feel well about how so much time has passed since they hurt my wife and nothing has happened since, it is like no one believes us but they believe the [soldiers],” sworn statement rendered before public notary by Mr. Prisciliano Sierra, supra note 66, folios 1502 to 1504. On the other hand, the expert witness Correa González noted that Mr. Prisciliano Sierra “[f]eels that he is unable to properly care for his family, because he has accompanied [his wife] throughout the entire process of filing a complaint, his financial situation has deteriorated to the point where they are no longer able to live as they did before,” psycho-social expert opinion rendered before a public notary by Mrs. Correa González, supra note 113, folios 1617 and 1618).

145. As for the children of Mrs. Fernández Ortega, the Tribunal considers that one of the primary afflictions they suffered has to do with their presence in a situation of extreme violence, until immediately prior to the rape of their mother (supra para. 83), a fact which likely generated a profound psychological impact, intense fear, and uncertainty. The expert witness, Correa González, stated that, the most evident psychological impact “has to do with the wounds of the images of horror by which they have had to live with for so long, besides the fact of having experienced death based on the possibility that their mother could have died, and because of the violence of which she was a target. This has created a sense of fear and distrust towards life.” [FN127] In this regard, the Court notes that two of the children present at the time preceding the rape were two and four years old, to which it was stated to the Court that only the latter, named Colosio Prisciliano Fernandez, has some memories of the events. [FN128] On their behalf, the two eldest daughters have clear memories of what occurred [FN129] in fact, the eldest daughter, Noemí Prisciliano Fernández, has given testimony regarding the facts she witnessed and the impact it caused her. [FN130] Due to the different experiences and recollection of memories, the Court understands that the afflictions produced from witnessing the events that led to the rape are not the same for all four children. [FN131]

[FN127] Cf. psycho-social expert opinion rendered by Mrs. Correa González, supra note 113, folios 1618. The Court notes that the expert testimony of Mrs. Correa indicated that the “small children were not interviewed so as not to cause undue harm from the reliving of memories without the possibility of self control given the situation.”

[FN128] Cf. Assessment of the psychological impact, supra note 30, folio 5691.

[FN129] Cf. Assessment of the psychological impact, supra note 30, folios 5690 and 5691.

[FN130] Cf. Sworn statement of Noemí Prisciliano Fernández rendered before a public notary, supra note 68, folio 1494.

[FN131] Pursuant to the birth certificate of Neftalí Prisciliano Fernández, she was born on September 17, 2003, that is, two years after the events occurred. Cf. Birth certificate of Neftali Prisciliano Fernández, supra note 65, folio 3886.

146. On the other hand, the affliction of the children is also associated with the search for justice that was initiated by their parents, as well as with the consequences that such search, along with the effects of the rape itself, generated within their family dynamics. The Tribunal has proven the fact that Ms. Fernández Ortega and her husband found themselves compelled to leave their community on those occasions wherein they had to make inquiries relating to the search for justice in the case. Consequently, they had to leave their children home alone, which did produce a deep fear in the children, especially given the military presence in the area. [FN132] In this sense, the facts of the case and the pursuit of justice generated significant and harmful changes in their family life that has particularly affected the children whom have experienced great suffering for all these years. [FN133]

[FN132] Statement of the young Noemí Prisciliano Fernández: “I would stay alone with my siblings, and I would be very afraid because I would think that the [soldiers] would come again,” sworn statement of Noemí Prisciliano Fernández rendered before a public notary, supra note 68, folio 1494. Moreover, Mr. Prisciliano Sierra stated: “each [time] we left to Ayutla we would have to leave our children alone with the fear that something would happen to them.” Sworn statement of Mr. Prisciliano Sierra rendered before a public notary, supra note 66, folio 1502; On her behalf, Mrs. Fernández Ortega stated: “[e]ach time we would return from Ayutla there were many problems, because my children would stay home alone, and I was afraid [...] that more [soldiers] would do something to them,” sworn statement of Mrs. Fernández Ortega rendered before a public notary, supra note 68, folio 1486.

[FN133] Mrs. Fernández Ortega stated: “[our children] also suffered a lot because of what happened to us, and even more those which saw how the soldiers started to abuse me. We already sent Noemi and Ana Luz to Ayutla because in Barranca Tecoani something could happen to them. Because they saw everything, I see that they suffer a lot and that they remember what happened, because they are afraid of the [soldiers]. The youngest also suffer. Colosio and Nelida were very young when everything happened, but they see very well all the problems we have had and they do not do well in school. Even Neftali who was not yet born when the [soldiers] came, I see that she is afraid and never leaves my side,” sworn statement by Mrs. Fernández Ortega rendered before a public notary, supra note 62, folio 1488. Noemí Prisciliano Fernández stated: “sometimes me and my brothers would stay alone and there was nothing to eat, because there was little money and they needed it to go out and ask for justice. After, when my father and mother returned, I would see them fight a lot because of what had happened and they would be frustrated. All that was very hard. Sometimes I would stay quiet or I would wake up at night crying or scared. I think that after what happened everything changed for us [...] I feel angry and with fear [...] Now I speak Spanish, and I had to come to Ayutla to study and I return home [...] often, but even still I feel scared when I am alone or when I see the [soldiers]. And now that I am

older, I also see that my father, my mother, and my siblings are also afraid. Before [...] we all lived well, but then everything changed, my brothers are very sad in school, the other boys make fun of us [...], my youngest siblings barely ever hang out with or play with other kids, my brother Colosio who is now older has even fought with other kids because of what they say about my mother” sworn statement by Noemi Prisciliano Fernández rendered before a public notary, supra note 68, folio 1495. On his behalf, Mr. Prisciliano Sierra stated: “[I]ater when my daughter Noemi finished grade school she went to study middle school in the city of Ayutla, because we felt that it was dangerous, something could happen to her, and we did the same with Ana Luz,” sworn statement by Mr. Prisciliano Sierra rendered before a public notary, supra note 66, folio 1503.

147. Additionally, regarding the young Noemí Prisciliano Fernández, she had to repeatedly confront the authorities to testify about the facts. [FN134] This has been verified by the expert testimony of Mrs. Correa, in stating that, the fact of having to testify before officials at a young age “created a secondary victimization, because she recalled[,] in the presence of governmental authorities[,] what happened to her mother, thus causing her profound feelings of fear and anger, and this sensation remained for a long time.” [FN135]

[FN134] Noemí Prisciliano Fernández stated: “I was very nervous because I barely spoke Spanish then. All of it was very difficult because no one else helped us and it was sort of like no one believed what had happened and they treated us poorly for not speaking Spanish,” sworn statement by Noemi Prisciliano Fernández rendered before a public notary, supra note 68, folio 1494.

[FN135] Cf. Psycho-social expert opinion rendered before a public notary by Mrs. Correa González, supra note 113, folio 1618.

148. The expert witness, Correa González, stated that, “the emotional climate of the family [...] has been permeated by fear[. O]ne observes their reluctance to speak about the emotions which affect them, they are afraid of reviving that which has been kept in silence for so long, not knowing what to say, nor what to do. This feeling of being in constant risk has made them remain in a place of uncertainty and insecurity, causing such emotional exhaustion that they are prevented from improving their family relationship.” [FN136]

[FN136] Cf. Psycho-social expert opinion rendered before a public notary by Mrs. Correa González, supra note 113, 1619.

149. Based on the aforementioned considerations, the Court concludes that the rape of Mrs. Fernández Ortega as well as the facts related to the pursuit of justice and impunity in the present case, involved a violation of the right to personal integrity enshrined in Article 5(1) of the Convention against Mr. Prisciliano Sierra and Noemí, Ana Luz, Colosio, Nelida, and Neftalí, all by the surname of Prisciliano Fernandez, in relation with Article 1(1) thereof.

150. On the other hand, the Court notes that the argument posed by the representatives regarding the alleged violation of Article 19 of the American Convention is time barred (*supra* para. 140), to which it will not rule on the matter. Moreover, the Court deems that it is not necessary to rule on other arguments that refer to the same facts and which have been analyzed in the light of other conventional obligations.

151. As for the mother and siblings of Mrs. Fernández Ortega, the Court considers it relevant to recall that although in its jurisprudence it has determined that it can declare the violation of the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption *iuris tantum* regarding mothers and fathers, sons and daughters, husbands and wives, and permanent companions, and this has been limited to specific types of cases, as long as it is a response to its particular circumstances, as has occurred for example, in cases of massacres, forced disappearances of individuals, and extrajudicial executions. [FN137] There is no presumption, therefore, that the violation of personal integrity exists in all cases involving family members, nor to all family members. In this case, the Court will consider whether the evidence on record merits a violation of personal integrity for the mother and siblings of Mrs. Fernández Ortega.

[FN137] Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, para. 119; Case of Radilla Pacheco, *supra* note 33, para. 162, and Case of Chitay Nech et al., *supra* note 18, para. 220.

152. With regard to Mrs. Maria Lidia Ortega, mother of Mrs. Fernández Ortega, the Court only has the expert testimony of Mrs. Correa González to rely on, which indicates some of the afflictions she suffered. The Court does not have sufficient evidence that demonstrates that the harm claimed involved a violation of the personal integrity of said individual. Moreover, certain arguments made by the representatives to support the suffering of Mrs. Maria Lidia Ortega, - namely that “she has taken over the care of [her grandchildren] when necessary to allow [Mrs. Fernández Ortega] to carry out the steps required in the pursuit of justice,” are not consistent with the testimonies of Mrs. Fernández Ortega, her husband, and daughter, regarding the consequences of the search for justice, which involved, as was indicated, that the children were left alone (*supra* para. 146).

153. Regarding Messrs. Lorenzo and Ocotlán Fernández Ortega, the representatives referred to suffering experienced by the rape of their sister and the lack of justice. Mr. Lorenzo Fernández Ortega, because of the support he offered his sister in the pursuit of justice, was tortured until he was murdered. While the preliminary investigation opened by this fact indicated that the body of Mr. Lorenzo Fernández Ortega, found dead on February 10, 2008, had numerous injuries, [FN138] and that Mrs. Fernández Ortega and the others affirm that said fact is related to this case, [FN139] the Court notes that this involves generic claims that lack evidentiary support. As such, the Court does not have sufficient evidence to establish the causal link between the

aggression suffered by Mr. Lorenzo Fernandez with the facts of the present case. Similarly, the Court has no evidentiary testimony, expert or documented, which demonstrates the existence of a violation of the right to personal integrity of Mr. Ocotlán Fernandez Ortega.

[FN138] Cf. Public Prosecutor's Office of the Common Jurisdiction of Allende. Preliminary Investigation ALLE/SC/01/032/2008 opened for murder, supra note 30, folios 5714 to 5725.

[FN139] Mrs. Fernández Ortega stated: “[a]lso in the month of February of [2008], my brother Lorenzo Fernández Ortega, who was always accompanying me and giving me advise and encouragement to continue seeking justice, was found dead and tortured. [...] instead of giving me justice for the rape they did to me, they killed my brother who supported me a lot and always helped me,” Cf. Sworn statement before public notary of Mrs. Fernández Ortega, supra note 62, folio 1489. In similar terms, cf. Psycho-social expert opinion of Mrs. Correa González, supra note 113, folios 1612 and 1613, and sworn statement before public notary of Noemí Prisciliano Fernández, supra note 68, folio 1495

154. Based on the foregoing, the Court does not find as proven the violation of the right to personal integrity enshrined in Article 5(1) of the Convention, under Article 1(1) thereof, to the detriment of María Lidia Ortega, Lorenzo, and Ocotlán Fernández Ortega.

F. Interference in the family residence

155. The representatives affirmed that the members of the Army invaded the residence of the victim and her next of kin in an arbitrary manner, to which they requested the Court declare a violation of the right to private life enshrined in Article 11(2) of the Convention, to the detriment of Mrs. Fernández Ortega and her family.

156. This Court has established that the alleged victim, her next of kin, or her representatives can evoke Rights distinct from those in the application of the Commission, based on the same facts presented by it. [FN140]

[FN140] Cf. Case of “Five Pensioners” v. Perú. Merits, Reparations, and Costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of González et al., (“Cotton Fields”), supra note 15, para. 232, and Case of Manuel Cepeda Vargas, supra note 18, para. 49.

157. Moreover, the Court has established that the protection of private life, family life, and residence, implies the recognition that a personal space exist that must be free and immune from abusive or arbitrary invasions or aggressions by third parties or the public authorities. In this regard, an individual's home and private and family life are intrinsically connected, because the residence is the space in which private and family life can evolve freely. [FN141]

[FN141] Cf. Case of the Masacre of Ituango, *supra* note 117, paras. 193 and 194, and Case of Escué Zapata. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 165, para. 95.

158. Mrs. Fernandez Ortega stated that on the days that the events occurred, “[s]he was inside her residence with [her] children [and that] at that point, eleven [s]oldiers arrived, [and] three [of them] [...] came [into her] home without [her] consent.” [FN142] Using this language she spoke and before the Public Prosecutor’s Office to file a claim based on the facts and before the Court in the presence of a public notary. On her behalf, her daughter Noemí Prisciliano Fernández, in rendering her statement to the Public Prosecutor’s Office and before this Court, said that she was in the kitchen with Mrs. Fernández Ortega when the three soldiers entered. [FN143] The State indicated that the Political Constitution and the Code of Military Justice prohibit the military from entering domestic residences.

[FN142] Cf. Complaint filed by Mrs. Fernández Ortega before the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende, *supra* note 69, folio 6836. Likewise, see sworn statement before public notary of Mrs. Fernández Ortega, *supra* note 62, folio 1484.

[FN143] Sworn statement before public notary of Noemí Prisciliano Fernández, *supra* note 68, folio, 1493.

159. Based on the abovementioned, the Court deems that, military solders entering Mrs. Fernandez Ortega’s residence without documented legal authorization to do so, and without the consent from its occupants, constituted an arbitrary and abusive interference at her family residence. Therefore, the Court concludes that the right enshrined in Article 11(2) of the American Convention was violated, in relation with Article 1(1) of the same, to the detriment of Mrs. Fernández Ortega, Mr. Prisciliano Sierra, and Noemí, Ana Luz, Colosio and Nélide, all with the surname of Prisciliano Fernández.

IX. ARTICLES 8 (JUDICIAL GUARANTEES) [FN144] AND 25 (JUDICIAL PROTECTION), [FN145] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) [FN146] OF THE AMERICAN CONVENTION, ARTICLE 7 OF THE CONVENTION OF BELÉM DO PARÁ AND ARTICLES 1, 6, AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

[FN144] Article 8(1) of the American Convention establishes:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

[FN145] Article 25(1) of the American Convention establishes:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[FN146] Article 2 of the American Convention establishes:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

160. In order to examine the alleged violations of Articles 8 and 25 of the American Convention and the alleged noncompliance with the obligations enshrined in other relevant Inter-American instruments, the Court will establish: a) the facts of this case in relation to the preliminary inquiries; it will then set out the arguments of the parties and the findings of the Court in relation to: b) the intervention of the military justice system; c) the alleged lack of due diligence in the processing of the complaint and the investigation of the rape; d) the State's request concerning specific aspects of the investigations, and e) the alleged threats to and harassment of people involved in the case.

A. Facts relating to the criminal investigation

i) Preliminary Investigation ALLE/SC/03/76/2002 - Civil Public Prosecutor's Office

161. On March 24, 2002, as a result of the complaint filed by Mrs. Fernández Ortega, Preliminary Investigation ALLE/SC/03/76/2002 was opened for the offenses of rape, unlawful entry, abuse of authority, and the crimes of consequence thereof (supra para. 85). On April 5, 2002, when Mrs. Fernández Ortega was not at home, [FN147] the scene of the incident was officially inspected by an agent of the Allende Public Prosecutor's Office and other government employees. On April 18, 2002, Mrs. Fernández Ortega expanded her statement before the Allende Public Prosecutor's Office. [FN148] Subsequently, on May 17, 2002, having taken several measures relating to the identification of the possible perpetrators, [FN149] the Allende Public Prosecutor's Office declared itself incompetent because "the victim ha[d] indicated in her first statement that those who committed the offense were members of the Army," and forwarded the file of Preliminary Investigation ALLE/SC/03/76/2002 to the Military Public Prosecutor's Office adjoined to the 35th Military Zone. [FN150]

[FN147] Cf. Certificate of site visit issued by the Public Prosecutor's Office of the Common Jurisdiction of the Judicial District of Allende on April 5, 2002 (case file of annexes to the answer to the application, tome II, folios 6846 to 6848).

[FN148] Cf. Brief requesting expansion of the complaint filed by Mrs. Fernández Ortega, supra note 69, tome II, folio 6869.

[FN149] Among other procedures, assistance from the judicial police of the state of Guerrero was requested for the investigations, the visit to the crime scene, the results of the lab studies from the examination of the vaginal cavity of the victim were requested, names were requested,

as well as descriptions, photographs of the members of the Mexican Army found in the region on the day the facts occurred, Cf. Orders from the Agent of the Allende Common Public Prosecutor's Office: No. 282 and No. 443 on March 24 and April 24, 2002 (case file of annexes to the answer to the application, tome II, folios 6830 and 6880, respectively); No. 466 of April 26, 2002 (case file of annexes to the answer to the application, tome II, folio 6884); No. 469 of April 26, 2002 (case file of annexes to the answer to the application, tome II, folio 6887); No. 327 of April 2, 2002 (case file of annexes to the answer to the application, tome II, folio 6850); No. 374 y No. 460 of April 10 and 26, 2002 (case file of annexes to the answer to the application, tome II, folios 6857 and 6881, respectively), and No. 468 of April 26, 2002 (case file of annexes to the answer to the application, tome II, folio 6886). On the other hand, on May 6, 2002 at the Public Prosecutor's Office of the Common Jurisdiction of the Judicial District of Allende they were to carry out a sketch of the likely perpetrators of the crimes committed to the detriment of Mrs. Fernández Ortega. One member of the OPIM present at the event indicated that Mrs. Fernández Ortega would be taken on May 7, 2002, to the area of investigatory services to carry out the drawing of the sketch of the likely perpetrators. Cf. Certification issued by the Public Prosecutor's Office of the Common Jurisdiction of the Judicial District of Allende on May 6, 2002 (case file of annexes to the answer to the application, tome II, folios 6891 and 6892).

[FN150] Cf. Agreement to forward for lack of jurisdiction of the Agent of the Public Prosecutor's Office of the Common Jurisdiction of Allende on May 17, 2002 (case file of annexes to the answer to the application, tome II, folios 6898 and 6903).

ii) Preliminary Investigation 35ZM/06/2002 and SC/172/2005 - Military Public Prosecutor's Office

162. Almost simultaneously with Mrs. Fernández Ortega's complaint, on March 27, 2002, the Commander of the 35th Military Zone presented to the Military Public Prosecutor's Office a "formal complaint for acts that probably constitute a crime, supposedly committed by military personnel," owing to events reported in a newspaper article of March 25, 2002, in the Diario El Sur, [FN151] which initiated Preliminary Investigation 35ZM/06/2002. [FN152] On May 21, 2002, the Military Public Prosecutor's Office, based on Article 57 fraction II paragraph (a) of the Code of Military Justice (hereinafter Article 57(II)(a)), "accept[ed] the lack of jurisdiction *ratione materiae*" (supra para. 161), and validated all the measures taken in Preliminary Investigation ALLE/SC/03/76/2002, adding them to Preliminary Investigation 35ZM/06/2002. [FN153]

[FN151] Cf. Order No. 9485 of the Commanding Officer of the 35th Military Zone on March 27, 2002 (case file of annexes to the answer to the application, tome I, folio 6373).

[FN152] Cf. Radiogram of the Military Public Prosecutor's Office, within the Preliminary Investigation 35ZM/06/2002, of March 27, 2002 (case file of annexes to the answer to the application, tome I, folio 6378).

[FN153] Cf. Agreement issued by the Agent of the Military Public Prosecutor's Office on May 21, 2002 (case file of annexes to the answer to the application, tome II, folios 6904 and 6905).

163. On March 18, 2003, Mrs. Fernández Ortega submitted a brief in which she “oppose[d] and contest[ed] the military jurisdiction for the investigation of the unlawful acts committed against [her]” and requested that the Military Public Prosecutor’s Office “abstain from continuing to hear” the case. [FN154] On the same day, the Military Public Prosecutor’s Office rejected the request on the grounds that “[t]he jurisdiction of the military justice system was duly founded and justified.” [FN155] On April 10, 2003, Mrs. Fernández Ortega filed a petition for relief [amparo] against this decision, [FN156] which was dismissed by the First District Court of the state of Guerrero on September 3, 2003. [FN157] Said decision was contested by Mrs. Fernández Ortega [FN158] and confirmed on November 27, 2003, by the Second Collegiate Court of the Twenty-first Circuit of the state of Guerrero [FN159].

[FN154] Cf. Brief of objection presented by Mrs. Fernandez Ortega challenging jurisdiction, supra note 87, folios 7101 and 7119).

[FN155] Cf. Order No. 0262 issued by the Agent of the Military Public Prosecutor’s Office on March 18, 2003 (case file of annexes to the answer to the application, tome III, folios 7121 and 7122).

[FN156] Cf. Petition for relief [Amparo] filed by Mrs. Fernández Ortega on February 9, 2003 supra note 87, folios 9206 and 9235).

[FN157] Cf. Order of the First District Judge in the state of Guerrero on the Petition for relief [Amparo] on Administrative Review No. 2000/03 on September 3, 2003, (case file of annexes to the answer to the application, tome VII, folios 9005 to 9024).

[FN158] Cf. Appeal for review of the decision of September 3, 2003, of the First District Judge in the state of Guerrero filed by Mrs. Fernández Ortega on September 19, 2003, (case file of annexes to the answer to the application, tome VII, folios 8873 to 8880).

[FN159] Cf. Judgment delivered by the Second Collegiate Court of the Twenty-first Circuit of the state of Guerrero concerning the Petition for relief [Amparo] on Administrative Review No. 2000/03 on November 27, 2003, (case file of annexes to the answer to the application, tome VII, folios 8898 to 8969).

164. On December 30, 2004, the Military Public Prosecutor’s Office forwarded the case file to the Military Attorney General for Justice and submitted the file of the Preliminary Investigation to his consideration, finding that “military discipline had not been breached.” [FN160] Nevertheless, the Military Attorney General for Justice forwarded the file to the Fourteenth Investigator of the Military Public Prosecutor’s Office so that the investigation could continue; on August 30, 2005, this official decided that Preliminary Investigation 35ZM/06/2002 should be continued under number SC/172/2005/XIV. [FN161] A few months later, on March 28, 2006, the Fourteenth Investigator of the Military Public Prosecutor’s Office submitted the file of Preliminary Investigation SC/172/2005/XIV to the consideration of the Military Attorney General for Justice, “because, to date, it has not been proven that military personnel perpetrated an unlawful act”; he also forwarded “a summary of the Preliminary Investigation [...] to the Attorney General for Justice of the State of Guerrero so that, within his jurisdictional forum, he could conduct the necessary investigations to determine the probable participation of civilians in the reported facts.” [FN162]

[FN160] Cf. Decision issued by the Military Public Prosecutor's Office on December 30, 2004 (file of annexes to the brief of pleadings and motions, Annex P 88, tome V, folios 5429 to 5475).

[FN161] Cf. Certification issued by the Military Public Prosecutor's Office on August 30, 2005 (file of annexes to the brief of pleadings and motions, Annex P 88, tome V, folio 5476).

[FN162] Cf. Decision issued by the Military Public Prosecutor's Office on March 28, 2006 (file of annexes to the brief of pleadings and motions, annex P 93, tome V, folios 5542 to 5556).

165. From September 27, 2002, to September 1, 2004, while the investigation was being conducted by the Military Public Prosecutor's Office, Mrs. Fernández Ortega was summoned on at least seven occasions to take part in different procedures, [FN163] complementary to those conducted by this ex officio organ; [FN164] however, she did not appear in response to any of the requests. [FN165] On the other hand, Mrs. Fernández Ortega and her daughter, Noemí Prisciliano Fernández, were summoned to expand their statements before the public prosecutor and to take part in the procedure to prepare the artist's sketch on July 3, 2003. [FN166] On that day, Mrs. Fernández Ortega arrived accompanied by a legal adviser and an interpreter, and stated that "she objected to carrying out the proceeding for which she had been summoned," because she considered that the authority that had summoned her was not competent. [FN167]

[FN163] Cf. Order No. 0853 issued by the Military Public Prosecutor's Office on September 18, 2002, (case file of annexes to the answer to the application, tome II, folio 6943); agreement issued by the Military Public Prosecutor's Office on October 28, 2002 (case file of annexes to the answer to the application, tome II, 6955 and 6956); Order No. 0707 issued by the Military Public Prosecutor's Office on August 19, 2003 (case file of annexes to the answer to the application, tome V, folio 7956); certification issued by the Military Public Prosecutor's Office on November 21, 2003 (case file of annexes received during the public hearing, tome I, folio 12284 and 12285); agreement issued by the Common Public Prosecutor's Office on August 6, 2004 (case file of annexes to the answer to the application, tome V, folio 8008); certification issued by the Common Public Prosecutor's Office on August 15, 2004 (case file of annexes to the answer to the application, tome V, folio 8004), and certification issued by the Common Public Prosecutor's Office on September 1, 2004 (case file of annexes to the answer to the application, tome V, folio 8002).

[FN164] Cf. Order No. 0561 issued by the Agent of the Military Public Prosecutor's Office on May 23, 2002 (case file of annexes to the answer to the application, tome V, folio 7794); Order No. 0561 issued by the Military Public Prosecutor's Office on June 6, 2002 (case file of annexes to the answer to the application, tome V, folio 7797), and Orders No. 0692, No. 0765, and No. 0862 issued by the Military Public Prosecutor's Office on July 5, August 9, and September 20, 2002 (case file of annexes to the answer to the application, tome V, folios 7811, 7832, and 7838, respectively).

[FN165] Cf. Certifications issued by the Agent of the Military Public Prosecutor's Office on September 27, 2002, August 29, 2003, and November 21, 2003 (case file of annexes to the answer to the application, tome I, folio 6950, and tome V, folios 7959 and 7960 and 7945 and 7946, respectively), and certifications issued by the Agent of the Common Public Prosecutor's

Office on November 15, 2002, August 10, 2004, August 15, 2004, and September 1, 2004 (case file of annexes to the answer to the application, tome II, folio 7015, and tome V, folios 8006, 8002, and 8002, respectively).

[FN166] Cf. Order/ No. issued by the Agent of the Common Public Prosecutor's Office on June 25, 2003 (case file of annexes to the answer to the application, tome V, folio 7814).

[FN167] Cf. Certification issued by the Common Public Prosecutor's Office on July 3, 2003 (case file of annexes to the answer to the application, tome V, folios 7815 to 7817).

iii) Preliminary Investigation ALLE/SC/03/001/2007 – Civil Public Prosecutor's Office

166. On January 3, 2007, the Allende Public Prosecutor's Office received the summary of Preliminary Investigation SC/172/2005/XIV, and ordered the opening of Preliminary Investigation ALLE/SC/03/01/2007 and the implementation of "as many [...] procedures [as] necessary [for the] full clarification of the [...] facts." [FN168] On June 21, 2007, it forwarded the Preliminary Investigation ALLE/SC/03/001/2007 to the Office of the Attorney General for Justice of the State of Guerrero. [FN169] On May 13, 2008, this State Office requested the collaboration of the Office of the Attorney General of the Republic in the execution of some procedures, [FN170] a request that was reiterated specifically to the Office of the Special Prosecutor for Offenses of Violence against Women and Trafficking of the Federal Public Prosecutor's Office (hereinafter "Special Prosecutor's Office"), on August 18 that year. [FN171] In view of the intervention of the Special Prosecutor's Office, on September 10, 2008, Mrs. Fernández Ortega presented a brief addressed to the agent of the Special Prosecutor's Office requesting that "the jurisdiction for investigating the unlawful act of which [she] had been a victim be determined before any procedure is carried out," since the Preliminary Investigation was being conducted by the Office of the Attorney General for Justice of the state of Guerrero while the Special Prosecutor's Office was adjoined to the Office of the Attorney General of the Republic. [FN172] Furthermore, on September 10, 2008, a representative of Mrs. Fernández Ortega communicated with the Director of Preliminary Investigations of the Special Prosecutor's Office and stated that "[Mrs.] Fernández Ortega would appear before [that] investigative authority [...] on September 15, 2008," to work on the sketch of her alleged aggressor. [FN173]

[FN168] Cf. Agreement to open and settle issued by the Common Public Prosecutor's Office of the Judicial District of Allende on January 3, 2007 (case file of annexes to the answer to the application, tome I, folios 6359 and 6360).

[FN169] Cf. Order No. 571 issued by the Agent of the Common Public Prosecutor's Office de Allende on June 21, 2007 (case file of annexes to the answer to the application, tome I, folio 6367).

[FN170] Cf. Order No. PGJE/DGCAP/3892/2008 issued by the Attorney General for Justice of the state on May 13, 2008 (case file of annexes to the answer to the application, tome VI, folio 8273).

[FN171] Cf. Order No. FEVIMTRA/CGT/VCM/DAP/897/08 of the Special Prosecutor's Office for Crimes of Violence against Women and Human Trafficking on August 18, 2008 (case file of annexes to the answer to the application, tome VI, folio 8269).

[FN172] Cf. Brief of Mrs. Fernández Ortega presented on September 10, 2008 (case file of annexes to the answer to the application, tome VI, folios 8295 to 8297).

[FN173] Cf. Certification issued by the Agent of the Office of the Special Prosecutor for Crimes of Violence against Women and Human Trafficking of the Federal Public Prosecutor's Office on September 10, 2008, (case file of annexes to the answer to the application, tome V, folio 7908).

167. On September 15, 2008, the alleged victim appeared in person and stated that she would “not expand or provide information on [her] attackers until [she] received an answer to [her] brief” of September 10, 2008, [FN174] wherein she requested clarification on the competent investigating authority. [FN175] Given the abovementioned, on September 22, 2008, the agent of the Special Prosecutor's Office of the Public Prosecutor of the Federation ordered the return of the warrant letter partially carried out to the Attorney General's Office of Guerrero, given that it was prevented from duly complying with the request for collaboration, given that Mrs. Fernandez Ortega appeared in writing and subsequently in person expressing her unwillingness to offer that required. [FN176] On December 2, 2008, the Director General of Preliminary Investigations of the Office of the State Attorney General for Justice forwarded Preliminary Investigation ALLE/SC/03/001/2007 to the Office of the Special Prosecutor for the Investigation of Sexual Offenses and Domestic Violence of Guerrero (hereinafter “Office of the Special Prosecutor for Sexual Offenses”), “so that it could continue undertaking the necessary procedures to complete, and reach a decision in accordance with its competence.” [FN177] Between January 16, 2007, to September 10, 2008, Mrs. Fernández Ortega was summoned at least five times to take part in different procedures, [FN178] but did not come forth for any of the requests. [FN179]

[FN174] Cf. Ministerial statement of Mrs. Fernández Ortega before the Agent of the Office of the Special Prosecutor for Crimes of Violence against Women and Human Trafficking of the Federal Public Prosecutor's Office on September 15, 2008, (case file of annexes to the answer to the application, tome VI, folios 8340 and 8341).

[FN175] Cf. Certification issued by the Agent of the Office of the Special Prosecutor for Crimes of Violence against Women and Human Trafficking of the Federal Public Prosecutor's Office on September 11, 2008, (case file of annexes to the answer to the application, tome VI, folios 8322 to 8324).

[FN176] Cf. Agreement to return Warrant Letter PGR/FEVIMTRA-C/CVM/002/08-08 on September 22, 2008 (case file of annexes to the answer to the application, tome VI, folios 8358, 8359, 8360, and 8361).

[FN177] Cf. Certification ex officio and Preliminary Investigation issued by the agent of the Common Public Prosecutor's Office adjoined to the Special Prosecutor for Sexual Offenses of January 9, 2009, (case file of annexes to the answer to the application, tome VI, folios 8248 and 8249).

[FN178] Cf. Order No. 67 issued by the Common Public Prosecutor's Office of the Judicial District of Allende on January 8, 2007 (case file of annexes to the answer to the application, tome I, folio 6362); Order PGJE/DGCAP/3327/2007 issued by the Common Public Prosecutor's Office on June 25, 2007 (case file of annexes to the answer to the application, tome V, folio 7935); Order PGJE/DGCAP/3561/2007 issued by the Common Public Prosecutor's Office on

June 29, 2007 (case file of annexes to the answer to the application, tome V, folio 7930); Order No. 5442 issued by the General Director of Control and Preliminary Investigations of the Attorney General for Justice of the state on August 4, 2008 (case file of annexes to the answer to the application, tome V, folio 7921), and Order FEVIMTRA/CGT/VCM/DAP/1060/08 issued by the Agent of the Federal Public Prosecutor's Office on September 2, 2008 (case file of annexes to the answer to the application, tome V, folio 7913).

[FN179] Cf. Certification issued by the Common Public Prosecutor's Office of the Judicial District of Allende on January 16, 2007 (case file of annexes to the answer to the application, tome I, folio 6363); subpoena issued by the Common Public Prosecutor's Office on June 29, 2007 (case file of annexes to the answer to the application, tome V, folio 7932); certification issued by the Common Public Prosecutor's Office on July 5, 2007 (case file of annexes to the answer to the application, tome V, folio 7927); certification issued by the Agent of the Federal Public Prosecutor's Office on August 11, 2008 (case file of annexes to the answer to the application, tome V, folio 7922), and brief of Mrs. Fernández Ortega presented by September 4, 2008 (case file of annexes to the answer to the application, tome V, folios 7886 to 7884).

iv) Preliminary Investigation FEIDSVI/003/2009 – Civil Public Prosecutor's Office

168. On January 9, 2009, the agent of the Common Public Prosecutor's Office, adjoined to the Special Prosecutor for Sexual Offenses of Guerrero ordered the opening of Preliminary Investigation FEIDSVI/003/2009. [FN180] In said preliminary investigation, on April 3, 2009, [FN181] notification was given of the February 5, 2009, decision of the Office of the Attorney General of the Republic responding to Mrs. Fernández Ortega's brief. It "reiterat[ed] that this federal authority had intervened exclusively in an accessory role for the execution of procedures that, owing to territorial jurisdiction, the Common Public Prosecutor's Office was unable to execute directly." [FN182] Furthermore, she was "requested to indicate the day and hour" in order to complete the pending procedures.

[FN180] Cf. Decision to open and settle investigation and registration issued by the Agent of the Special Prosecutor for Sexual Offenses on January 9, 2009 (case file of annexes to the answer to the application, tome VI, folios 8246 and 8248).

[FN181] Cf. Certification issued by the Agent of the Common Public Prosecutor's Office on April 3, 2009, (case file of annexes to the answer to the application, tome V, folios 8063 and 8064).

[FN182] Cf. Certification signed by the Agent of the Federal Public Prosecutor's Office of the Office of the Special Prosecutor for Crimes of Violence against Women and Human Trafficking of April 3, 2009 (case file of annexes to the answer to the application, tome V, folios 8059 and 8060).

169. On April 29, 2009 Mrs. Fernández Ortega asked the agent of the Common Public Prosecutor's Office "to consider that [her] failure to attend [the summons that day] was justified and to respond to [her] brief of September 10, 2008" [FN183] (supra paras. 166 and 167). This request was repeated on May 7, 2009, to which Mrs. Fernandez Ortega did not appear. [FN184]

On June 1, 2009, the Agent of the Special Prosecutor's Office for Sexual Offenses and Domestic Violence of the Attorney General for Justice reiterated the contents of the brief of February 5, 2009, and requested Mrs. Fernández Ortega to appear on June 4, 2009, to take part in the pending procedures. [FN185] That day, a representative of Mrs. Fernández Ortega appeared and requested in writing that "summonses be made with due notice so that it would be possible to establish contact with [Mrs. Fernández Ortega,] and she may attend said procedures," and "undertook to present them voluntarily at the beginning of June [2009]." [FN186] On August 5, 2009, the agent of the aforesaid Special Prosecutor's Office summoned Mrs. Fernández Ortega to take part in several procedures on August 14, 2009. [FN187] On August 10, 2009, Mrs. Fernández Ortega presented a brief in which she indicated that she was willing to appear for the procedure and asked that it be "carried out at the 'Tlachinollan' offices." [FN188] On August 14, 2009, she went to said office, expanded her ministerial statement, provided the physical data of her alleged attackers so that an artist's sketch could be prepared, and identified two possible aggressors in an album of photographs. [FN189]

[FN183] Cf. Order No. 104/2009 issued by the Agent of the Common Public Prosecutor's Office on April 21, 2009 (case file of annexes to the answer to the application, tome V, folio 8068); brief of Mrs. Fernández Ortega presented on April 29, 2009 (case file of annexes to the answer to the application, tome VI, folios 8400 to 8404), and certification issued by the Agent of the Common Public Prosecutor's Office on April 29, 2009 (case file of annexes to the answer to the application, tome V folio 8086).

[FN184] Cf. Order No. 012/2009 issued by the Agent of the Special Prosecutor's Office for the Investigation of Sexual Offenses and Domestic Violence of the state of Guerrero on May 5, 2009 (case file of annexes to the answer to the application, tome V, folio 8111); brief of Mrs. Fernandez Ortega presented on May 7, 2009 (case file of annexes to the answer to the application, tome VI, folios 8400 to 8404), and certification issued by the Agent of the Special Prosecutor's Office for the Investigation of Sexual Offenses and Domestic Violence of the state of Guerrero on May 7, 2009 (case file of annexes to the answer to the application, tome VI, folio 8436).

[FN185] Cf. Order No. 144/2009 issued by the Agent of the Common Public Prosecutor's Office on June 1, 2009, (case file of annexes to the answer to the application, tome V, folios 8131 to 8133).

[FN186] Cf. Brief of Mr. Rosales Sierra presented on June 4, 2009, (case file of annexes to the answer to the application, tome V, folios 8138 to 8141), and certification issued by the Agent of the Common Public Prosecutor's Office, on June 4, 2009 (case file of annexes to the answer to the application, tome V, folio 8136).

[FN187] Cf. Order No. 148/2009 issued by the Agent of the Common Public Prosecutor's Office on August 5, 2009, (case file of annexes to the answer to the application, tome V, folio 8145).

[FN188] Cf. Brief of Mrs. Fernández Ortega presented on August 10, 2009 (case file of annexes to the answer to the application, tome V, folios 8154 to 8158).

[FN189] Cf. Appearance before the Special Prosecutor's Office for Crimes of Violence against Women and Human Trafficking, expansion of the ministerial declaration and ratification of the brief of Mrs. Fernández Ortega, supra note 88, folios 8210, 8213 and 8214.

170. On October 29, 2009, the Special Prosecutor for the Investigation of Sexual Offenses and Domestic Violence of the Office of the Attorney General for Justice of the State of Guerrero forwarded Preliminary Investigation FEIDSVI/003/2009 to the Military Attorney General for Justice “taking into consideration the victim’s accusation [...] that those who had sexually abused her were soldiers.” [FN190]

[FN190] Cf. Decision issued by the Special Prosecutor for the Investigation of Sexual Offenses and Domestic Violence of the Office of the State Attorney General for Justice on October 29, 2009 (case file of annexes to the answer to the application, tome VI, folio 8750).

v) Preliminary Investigation SC/179/2009/II and SC/179/2009/II-E – Military Public Prosecutor’s Office

171. Finally, on November 18, 2009, the Military Attorney General’s Office acknowledged receipt of the files corresponding to Preliminary Investigation FEIDSVI/003/2009. As corresponds with said date, the Military Public Prosecutor’s Office opened Preliminary Investigation SC/179/2009/II-E, and ordered that “all [...] the measures [...] necessary to clarify the facts,” [FN191] and requested the appearance of two possible aggressors in order for them to give their statements. On March 5, 2010, the Department of Preliminary Investigations of the Military Attorney General’s Office ordered the investigation be forwarded to the Investigatory Agency of the Special Military Public Prosecutor’s Office, adjoined to the Department of Preliminary Investigations of said Public Prosecutor’s Office. [FN192] On March 13, 2010, the case file was assigned under Preliminary Investigation SC/179/2009/II-E [FN193] and the evidentiary procedures were carried out such as the taking of statements and expert opinions.

[FN191] Cf. Agreement of settlement issued by the Agent of the Military Public Prosecutor’s Office adjoined to the Section of Preliminary Investigations of the Attorney General for Military Justice on November 18, 2009 (case file of annexes received during the public hearing, tome I, folios 10493 and 10494).

[FN192] Cf. Order No. AP-A-10319 of the Section of Preliminary Investigations of the Attorney General for Military Justice on March 5, 2010 (case file of annexes received during the public hearing, tome VIII, folio 12544).

[FN193] Cf. Order No. AP-E/13029 of the Table of Special Matters of the Section of Preliminary Investigations of the Attorney General for Military Justice on March 13, 2010 (case file of annexes received during the public hearing, tome VIII, folio 12548).

B. Intervention of the military criminal justice system

172. The Inter-American Commission stated that there were no elements that justified the intervention of the military justice system in the investigation of the complaint for rape. The military justice system should be used only to try soldiers on active service for the alleged perpetration of strictly service-related offenses. In cases involving human rights violations, the

military criminal jurisdiction does not satisfy the requirements of independence and impartiality established in Article 8(1) of the American Convention. Similarly, the transfer of partial competence carried out by the military jurisdiction to the common jurisdiction to investigate only civilians is incompatible with the Convention. Consequently, it asked the Court to declare that the State violated Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof.

173. The representatives argued that Mrs. Fernández Ortega's rights to judicial guarantees and to judicial protection were violated by the State because her case was submitted to the military jurisdiction, based on Article 13 of the Political Constitution and Article 57(II)(a) of the Code of Military Justice, and also because the State had not provided an effective remedy to contest the application of said jurisdiction to her case. The military jurisdiction does not fulfill the requirements of impartiality, independence, and competence to hear human rights violations and the submission of the case to this jurisdiction violates the guarantee of a hearing by a competent tribunal. This practice owes itself to the absence of an express provision in the Mexican legal system that excludes the military justice system from hearing offenses of this type, and in general, to the transfer of ordinary offenses committed by soldiers on active service, or related to active service to this jurisdiction based on Article 57 of the Code of Military Justice. The foregoing is a result of the ambiguity of Article 13 of the Political Constitution and of Article 57(II)(a) of the Code of Military Justice. In addition, they emphasized that said situation is aggravated because Article 10 of the Amparo Law establishes three hypotheses in which the petition for amparo [relief] promoted by the victims and aggrieved parties is admissible, when requiring reparation of damage or responsibility for the perpetration of an offense; these hypotheses do not include one that permits the rejection of competence in favor of the military jurisdiction to be contested. Consequently, they asked the Court to declare that the State had violated the rights contained in Articles 8 and 25 of the American Convention, and also in Articles 1, 6, and 8 of the Convention Against Torture, and Article 7 of the Convention of Belém do Pará.

174. In the response to the application, the State, among other arguments, affirmed that the guarantee of a competent, independent, and impartial judge had not been breached, because the actions taken to that date corresponded to ministerial [investigative] authorities. Consequently, the Court has been asked to penalize the expectation of a violation that did not arise from an action that had taken place and, in particular, that had prejudiced Mrs. Fernández Ortega, given that she "has not been subjected to the military jurisdiction, and her complaint has not been heard by a military court." In addition, Mexico indicated that "[t]he development of the investigation has been a central element for determining jurisdiction. In other words, the investigation was initiated by civil authorities before whom the complaint was filed. When the participation of members of the armed forces was indicated, the investigation was transferred to the Military Public Prosecutor's Office." The alternation between the civil and military justice system at different times during the proceeding was due to the alleged victim's failure to collaborate, which prevented the investigation from advancing. Once Mrs. Fernández Ortega decided to come forward to take part in the preparation of the artist's sketch and the identification in the album of photographs, and "she identified those allegedly responsible" military personnel, the civil justice system once again transferred the case file to the Military Public Prosecutor's Office. Following the last rejection of competence by the Office of the Attorney General for Justice of the state of

Guerrero on March 13, 2009, the investigation of the facts was carried out by a special agency of the Office of the Military Attorney General for Justice, which has taken different measures that it is hoped will achieve concrete results with regard to the alleged facts in this case. Accordingly, it asked the Court to declare the inexistence of violations of Articles 8(1) and 25(1) of the American Convention, to the detriment of Mrs. Fernández Ortega. Subsequently, during the public hearing, the State affirmed that it “would not present any arguments with regard to the exercise of the military justice system in relation to jurisdictional competences in this case, because the Court has already made a final ruling on this issue in its Judgment in the case of [...] Radilla [Pacheco], a Judgment that the Mexican State is in the process of complying with.” (supra para. 17)

175. First, with regard to the State’s argument that the rights to judicial guarantees and to judicial protection have not been violated because the investigations remain at the ministerial [investigative] stage, the Court recalls its jurisprudence establishing that the guarantees under Article 8(1) of the Convention do not apply merely to judges and trial courts or judicial proceedings. [FN194] In particular, in relation to the investigations conducted by the Public Prosecutor’s Office, the Court has established that, depending on the circumstances of the case, it may have to examine the measures that relate to and constitute the grounds for judicial proceedings, particularly the investigation procedure, the results of which the opening and progress of said proceedings depend. [FN195] Accordingly, the Court will rule on the investigation conducted in this case and will determine whether the rights to judicial guarantees and judicial protection and other Inter-American norms have been violated in this domestic procedure.

[FN194] Cf. Case of Ivcher Bronstein v. Perú. Merits, Reparations, and Costs. Judgment of February 6, 2001. Series C No. 74, para. 105; Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 September 17, 2003. Series A No. 18, para. 124, and Case of Claude Reyes et al., v. Chile. Merits, Reparations, and Costs. Judgment of September 19, 2006. Series C No. 151, para. 118.

[FN195] Cf. Case of de los “Street Children” (Villagrán-Morales et al.), supra note 109, para. 222; Case of Tristán Donoso, supra note 117, para. 145, and Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203, para. 120.

176. In particular, with regard to the intervention of the military jurisdiction to examine acts that constitute violations of human rights, this Court recalls that, recently, it has ruled with regard to Mexico, in the case of Radilla Pacheco. Taking this into account, together with the arguments of the State (supra para. 17), for the effects of this case, the Court finds it sufficient to reiterate that:

In a democratic State of law, the military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests, related to

the functions characteristic of the military forces. Therefore, the Court has stated previously that only soldiers in active service shall be prosecuted under the military jurisdiction for the commission of crimes or offenses that, by their nature, threaten the juridical rights of the military system. [FN196]

Furthermore, [...] taking into account the nature of the crime and the juridical right damaged, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if applicable, prosecute and punish the authors of violations of human rights; rather the processing of those responsible always corresponds to the ordinary forum. In this regard, the Court has indicated on numerous occasions that “[w]hen the military jurisdiction assumes competence for a matter that should be heard by the ordinary jurisdiction, it is violating the right to a hearing by an ordinary court previously established by law and, a fortiori, to due process,” which, in turn, is closely related to access to justice. The judge in charge of hearing a case shall be competent, as well as independent, and impartial. [FN197]

In situations that violate the human rights of civilians, the military jurisdiction may not operate under any circumstance. [FN198]

The Court has emphasized that when the military courts hear cases involving acts that constitute violations of the human rights of civilians, they exercise jurisdiction not only with regard to the accused, who must necessarily be someone on active military duty, but also with regard to the civilian victim, who has the right to participate in the criminal proceedings not only for the effects of the corresponding reparation of the damage but also to exercise his or her rights to the truth and to justice [...]. In this regard, the victims of human right violations and their next of kin have the right to these violations being heard and decided by a competent tribunal, pursuant to due process and access to justice. The importance of the passive subject transcends the military sphere, because juridical rights that belong to the ordinary forum are involved. [FN199]

[FN196] Case of Radilla Pacheco, supra note 33, para. 272.

[FN197] Case of Radilla Pacheco, supra note 33, para. 273.

[FN198] Case of Radilla Pacheco, supra note 33, para. 274.

[FN199] Case of Radilla Pacheco, supra note 33, para. 275.

177. In no case does the rape of someone by military personnel bear a relationship to the military discipline or mission. To the contrary, the offense committed by military personnel against Mrs. Fernández Ortega affected juridical rights protected by domestic criminal law and the American Convention, such as the victim’s personal integrity and dignity. It is evident that such conduct is openly contrary to the obligations to respect and to protect human rights and, consequently, is excluded from the competence of the military jurisdiction. Based on the foregoing, the Court concludes that the intervention of the military justice system in the preliminary investigation of the rape was contrary to the parameters concerning the exceptional and restrictive nature of that system and involved the application of the military jurisdiction that functioned without taking into account the nature of the acts involved. This conclusion is valid in the present case, even though the incident is only at the investigation stage by the Military Public Prosecutor’s Office. As revealed by the criteria indicated above, the incompatibility of the American Convention with the intervention of the military justice system in this type of case does not refer merely to the act of prosecution, which is the responsibility of a court, but

essentially to the investigation itself, because this procedure constitutes the beginning and the necessary grounds for the subsequent intervention of an incompetent court. Based on the above, the Court finds that the State violated the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mrs. Fernández Ortega. As in previous cases, [FN200] when it has found that the military criminal jurisdiction is not competent, the Court considers that it is not necessary to rule on the other arguments concerning the independence and impartiality of the military justice system or the possible violation, based on the same facts, under other Inter-American instruments.

[FN200] Cf. Case of Cantoral Benavides, *supra* note 111, para. 115, and Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2009. Series C No. 207, para. 124.

178. Moreover, the Court observes that the intervention of the military justice system was based on Article 57(II)(a) of the Code of Military Justice (*supra* para. 162). [FN201] In this regard, the Court reiterates that this provision:

is a wide-ranging and imprecise provision that prevents determination of the exact connection between a crime that falls under the ordinary jurisdiction and military service objectively assessed. The possibility that the military courts may try a soldier accused of an ordinary crime, merely because he is on active service, implies that jurisdiction is awarded merely because he is a soldier. Thus, even if the crime is committed by soldiers while they are still on active service, or based on service-related acts, this is not enough for such crimes to be heard by the military criminal justice system. [FN202]

[FN201] Article 57(II)(a) of the Code of Military Justice, in what is relevant, states:

The following are crimes against military order:

II.- Those of the common or federal jurisdiction, when the commission has involved any of the circumstances hereby stated:

a) when committed by military personnel while on duty or as a result of acts of the same[.]

[FN202] Cf. Case of Radilla Pacheco, *supra* note 33, para. 286.

179. In the case of Radilla Pacheco, this Court found that the provision contained in said Article 57 functions as a rule and not as an exception, an indispensable characteristic of the military jurisdiction in order for it to conform to the standards established by this Court. [FN203] The Court recalls that Article 2 of the American Convention establishes the general obligation of each State Party to adapt its domestic law to the Convention's provisions in order to guarantee the rights that it establishes, which implies that the measures under domestic law must be effective (the *effet utile* principle). [FN204] Consequently, the Court finds that the State failed to

comply with the obligation contained in Article 2 of the American Convention, in connection with Articles 8 and 25 thereof, by extending the competence of the military justice system to crimes that have no precise connection to the military discipline or to juridical rights inherent in the military forum.

[FN203] Cf. Case of Durand and Ugarte v. Perú. Merits. Judgment of August 16, 2000. Series C No. 68, para. 117; Case of the Rochela Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 163, para. 200, and Case of Radilla Pacheco, supra note 33, para. 287.

[FN204] Cf. Case of Garrido y Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 68; Case of the Dos Erres Massacre, supra note 20, para. 122, and Case of Chitay Nech et al., supra note 18, para. 213.

180. Lastly, regarding the alleged inexistence of an effective remedy to contest the military competence, the Court has indicated that Article 25(1) of the Convention establishes the obligation of the State Parties to ensure, to all those subject to its jurisdiction, an effective judicial remedy for acts that violated their fundamental rights. [FN205]

[FN205] Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; Case of Usón Ramírez, supra note 200, para. 128, and Case of Radilla Pacheco, supra note 33, para. 291.

181. Mrs. Fernández Ortega filed a petition for amparo [relief] against the decision of the Military Public Prosecutor's Office adjoined to the 35th Military Zone that confirmed the military justice system's competence to hear the case. However, this application was dismissed in first instance (supra para. 163), because the contested facts "are not covered by Article 10 [of the Amparo Law], since it is not sufficient that [the applicant] is the victim and that the contested facts derive from a criminal case, for the aggrieved person to have a juridical right to file an application for protection of his or her rights; additionally, one of the exact hypotheses established in said Article 10 must exist." [FN206] This decision also indicated, "if this constitutional [...] mechanism is being used to obtain a declaration of incompetence issued by the administrative authority of the common forum against another authority of a different jurisdiction, such as the military forum, the proceeding is indisputably inadmissible, owing to the absence of legitimacy to file the constitutional action." [FN207] Lastly, it indicated that the aggrieved party, or the person who has the right to remedy a harm, "is authorized to file a petition for amparo [relief] only against decisions handed down in a criminal case, [...] when actions relate to the reparation of a harm; when the civil responsibility arises from the perpetration of the offense, and when there are actions that arise from the criminal case, relating immediately or directly to the establishment of the purpose of the offense and the safeguard of

the assets that are allocated to the remedy or the civil responsibility.” [FN208] This decision was confirmed with the same arguments. [FN209]

[FN206] Cf. Order of the First District Judge of the state of Guerrero, supra note 157, folio 9016.

[FN207] Cf. Order of the First District Judge in the state of Guerrero, supra note 157, folios 9018 and 9019.

[FN208] Cf. Order of the First District Judge in the state of Guerrero, supra note 157, folio 9022.

[FN209] Cf. Judgment of the Second Collegiate Court of the Twenty-first Circuit of the state of Guerrero, supra note 159 folios 8898 to 8969.

182. Of the mentioned decisions, this Court concludes that Mrs. Fernández Ortega was unable to contest the military jurisdiction’s competence to hear matters that, by their nature, should correspond to the authorities of the ordinary jurisdiction. In this regard, the Court has indicated that States have the obligation to establish by law and ensure due application of effective remedies and guarantees of due process before the competent authorities, in order to protect all those subject to its jurisdiction against acts that violate their fundamental rights or that lead to the determination of their rights and obligations. [FN210] Hence, the Court has established that, for the State to comply with the provisions of Article 25 of the Convention, the formal existence of remedies is not sufficient; instead they must be effective in the terms of the Convention. [FN211] The Court has reiterated that this obligation implies that the remedy must be appropriate to combat the violation and be applied effectively by the competent authority. [FN212]

[FN210] Cf. Case of the “Street Children” (Villagrán-Morales et al.). Merits, supra note 109, para. 79; Case of Acevedo Buendía et al. v. Perú. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 1, 2009 Series C No. 198, para. 72, and Case of Radilla Pacheco, supra note 33, para. 295.

[FN211] Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; Case of Radilla Pacheco, supra note 32, para. 296, and Case of Chitay Nech et al., supra note 18, para. 202.

[FN212] Cf. Case of Maritza Urrutia, supra note 111, para 117. Case of Radilla Pacheco, supra note 32, para. 296, and Case of Chitay Nech et al., supra note 18, para. 202.

183. As indicated above (supra paras. 176), the Court emphasizes that the victim’s participation in criminal proceedings is not limited merely to redressing the damage but, above all, to making effective her rights to know the truth and to justice before a competent court. This necessarily implies that, at the domestic level, adequate and effective remedies must exist for a victim to be able to contest the competence of the authorities that exercise jurisdiction over matters regarding which it is considered that they do not have competence. Consequently, in this case, the remedy of amparo [relief] was not effective to allow Mrs. Fernández Ortega to contest the hearing of the rape by the military jurisdiction, and this constitutes a violation of Article 25(1) of the American Convention.

C. Due diligence in processing the complaint and investigating the rape

184. The Inter-American Commission argued that Mrs. Fernández Ortega sought the protection of the authorities, but was confronted by “a system of justice that has not adapted its structures to respond to the specific needs of a [...] victim of [sexual] abuse.” The State incurred in serious errors when investigating the facts and processing Mrs. Fernández Ortega’s complaint: i) on March 24, 2002, the official of the Common Public Prosecutor’s Office refused to receive the alleged victim’s complaint on learning that those accused of committing the offense were soldiers, and only received it following the intervention of the Inspector General of the Human Rights Commission of Guerrero; ii) there were no interpreters who spoke Me’paa and, consequently, Mrs. Fernández Ortega had to be assisted by someone from her community in order to file the complaint; iii) there were no female medical personnel available to perform the gynecological examination, so that the alleged victim “was referred to the Ayutla public hospital and had to wait until the following day to be examined”; iv) the female doctor who finally evaluated her was not a forensic physician, but rather a general practitioner and lacked the special knowledge to treat victims of this type of offense, and v) the medical examination focused on a physical and gynecological examination, was not detailed, and did not include any findings on psychological aspects; moreover, even though more than eight years have elapsed since the incident, the psychological report on the alleged victim is still pending. Subsequently, the technical errors and omissions continued when the State experts failed to observe scientific investigation methodology applicable to samples of semen as biological evidence of the offense, and did not anticipate the need to carry out DNA testing. To the contrary, “they caused the destruction of the samples taken from the victim’s vaginal cavity, which was basic fundamental evidence, revealing a lack of respect for women victims of sexual offenses and the failure to give priority to such offenses in the entities where justice is imparted.” Hence, they thwarted the possibility of identifying the alleged perpetrators. Given the aforementioned, the Commission requested the Court to declare that the State violated Articles 8 and 25 of the American Convention in relation with Article 1.1 thereof.

185. Regarding the specific obligation to punish violence against women, the Commission indicated that it had received “information about the barriers that indigenous women face to obtain access to justice, which are generally related to social exclusion and ethnic discrimination.” These barriers can be particularly serious, since they represent forms of “multiple discrimination” because the alleged victims are women, indigenous, and poor. Particularly in cases of the rape of indigenous women, the investigators frequently refute the complaints and place the burden of proof on the victim; in addition, the investigation mechanisms are flawed and even threatening and disrespectful. Article 7(b) of the Convention of Belém do Pará obliges the State to act with due diligence when investigating and punishing violence against women, giving rise to specific obligations that complement the State’s obligations as regards compliance with the rights embodied in the American Convention. In the present case, the State failed in its obligation to act with due diligence to prevent, investigate, and punish violence against women, contained in Article 7 of the Convention of Belém do Pará. Lastly, the Commission asked the Court to declare that “the absence of an impartial [and diligent] investigation of torture, and the continuing impunity of those responsible, constitute a

failure to comply with the obligations established in Articles 1, 6, and 8 of the Convention [Against Torture].”

186. The representatives stated that there had not been a “serious, complete, and effective investigation into the facts [and,] as a result, the impunity of those responsible had subsisted for more than [eight] years.” Among other aspects, the representatives questioned that: i) the authorities did not initiate the investigation of the rape for the offense of torture, taking into account the particularities of the case and, hence, the international standards for the investigation of that type of violation; ii) the Common Public Prosecutor’s Office made serious errors when receiving the victim’s statement, which was not received by competent personnel with experience in dealing with victims, who were aware of the context and would be sensitive to the complainant; iii) the examinations of the victim were neither immediate, nor made by competent professionals, and did not respect the relevant international standards, the “questions that the female doctor asked the victim were not appropriate, because she omitted important matters such as the actions she took after the incident, for example, washing, or changing clothes, or the whereabouts of the clothes she was wearing at the time of the rape,” and iv) the authorities did not collect or adequately protect evidence that was fundamental for the investigation. In addition, the State authorities incorporated and assessed the evidence in a biased, isolated and discriminatory manner, which “on several occasions led to the investigation being closed.” In the civil jurisdiction, the State did not take any measure on its own initiative to establish the truth of what happened, but focused all the weight of the investigation on obtaining another statement from the victim and, when they obtained it, the investigation was turned over, a second time, to an authority without jurisdiction. Finally, the representatives affirmed that the State had violated Articles 8 and 25 of the American Convention owing to the unjustified delay in the investigation of the rape.

187. Regarding the obligation to punish violence against women, the representatives argued that the State had failed to comply with Article 7(b) of the Convention of Belém do Pará by failing to ensure the rights of Mrs. Fernández Ortega, because it had not conducted a serious and effective investigation into the incident of which she was a victim, since “the investigation of the rape [...] was plagued with irregularities, which resulted in the impossibility of obtaining justice, leaving the case in total impunity.” Finally, based on the same facts, they concluded that the State had failed to comply with the obligations established in Articles 1, 6, and 8 of the Convention Against Torture.

188. In the response to the application, the State, based on different arguments, denied that it had violated Mrs. Fernández Ortega’s rights to judicial guarantees and judicial protection. Subsequently, Mexico made a partial acknowledgement of its international responsibility concerning the right to judicial guarantees and to judicial protection (*supra* paras. 16 and 18), although it asked the Court to rule on certain specific points “in the context of its examination of Articles [...] 8(1) and 25 of the Convention” (*infra* paras. 203 to 207).

189. In addition, regarding the alleged violation of the Convention of Belém do Pará, when withdrawing its preliminary objection, Mexico specified that “this does not mean that the State acknowledges violations of that Convention” in the present case; to the contrary, it affirmed that said international instrument had not been violated (*supra* para. 11). The “omissions

acknowledged by the State during the investigations [...] necessarily involve a partial acknowledgement of responsibility based on lack of appropriate attention to the complaint of an act of gender-based violence, but do not constitute, in and of themselves, acts of gender-based violence.” The shortcomings in the medical and psychological attention [...] for Mrs. Fernández Ortega were remedied “by female personnel at the hospital in Ayutla de los Libres” and that the State’s omissions “were never founded on a criteria based on the alleged victim’s gender.” On the other hand, the State also referred to various initiatives of public policy implemented in order to prevent, punish, and eradicate gender-based violence and to ensure the non-repetition of events such as those suffered by Mrs. Fernández Ortega. Regarding the alleged violation of the Inter-American Convention to Prevent and Punish Torture, Mexico observed that, since “the constituent [objective and subjective] elements have not been verified to be able to conclude that, in the present case,] Mrs. [...] Fernández Ortega was the victim of an act of torture,” and thus, requested the Court to determine the inexistence of violations of Articles 1, 6, and 8 of said Convention, mentioned in regard to the investigation of the facts.

190. The Court notes that Mexico acknowledged its international responsibility in relation to Articles 8 and 25 of the American Convention for the following facts: the delay in providing medical care; the lack of specialized medical personnel in the agency of the Public Prosecutor’s Office in Ayutla de los Libres; the inability to provide medical and psychological care; the destruction of the gynecological evidence owing to lack of diligence in handling it; the errors in the chain of custody; the delay in taking statements, and that the investigations have taken eight years without the authorities having been able to reach conclusive decisions on the offense and the probable perpetrators. Nevertheless, it affirmed that it had not violated other rights established in the American Convention, or in any other Inter-American legal instrument (supra para. 17). Consequently, the Court still needs to determine certain facts and to decide the dispute with regard to whether the criminal investigation failed to comply with unacknowledged aspects of the guarantees arising from Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, and also Article 7 of the Convention of Belém do Pará and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

191. The Court recalls that the obligation to investigate human rights violations is one of the positive measures that States must adopt to guarantee the rights established in the Convention. [FN213] The obligation to investigate is an obligation of means rather than results. However, it must be undertaken by the State as an inherent juridical obligation and not as a mere formality preordained to be ineffective, or as a step taken by private interests that depends upon the procedural initiative of the victims or their next of kin, or upon their offer of proof. [FN214] In light of this obligation, once State authorities are aware of an incident, they should initiate *ex officio* and without delay, a serious, impartial, and effective investigation. [FN215] This investigation must be carried out using all available legal means with the aim of discovering the truth.

[FN213] Cf. Case of Velásquez Rodríguez. Merits, supra note 27, paras. 166 and 176; Case of Valle Jaramillo et al., supra note 137, para. 98, and Case of Garibaldi, supra note 195, para. 112

[FN214] Cf. Case of Velásquez Rodríguez. para, supra note 27, para. 177; Case of Radilla Pacheco, supra note 33, paras. 192 and 233, and Case of Chitay Nech et al., supra note 18, para. 192.

[FN215] Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of January 31, 2006. Series C No. 140, para. 143; Case of Perozo et al., supra note 46, para. 298, and Case of González et al., (“Cotton Field”), supra note 15, para. 290.

192. The Court has also indicated that Article 8 of the Convention reveals that the victims of human rights violations, or their next of kin, should have wide-ranging possibilities of being heard and taking part in the respective proceedings, both in order to clarify the facts and punish those responsible, and also to seek due reparation. Furthermore, the Court has indicated that the obligation to investigate and the corresponding right of the alleged victims or the next of kin is not only evident from the treaty-based provisions of international law that are binding for the State Parties, but also arise from domestic law regarding the obligation to investigate ex officio certain unlawful conduct, as well as from the norms that permit the victims or their next of kin to denounce or submit complaints, evidence or petitions, or take any other measure in order to play a procedural role in the criminal investigation in order to establish the truth of the facts. [FN216]

[FN216] Cf. As an example, the Federal Code of Criminal Procedure, Article 141, which recognizes the Rights of the injured party in the preliminary investigation (section A), in the criminal procedure (section B), and during the execution of punishments (section C), and the Criminal Procedure Code of the state of Guerrero, Article 5, first paragraph, which recognizes the right of the victim or the injured party to contribute to the Public Prosecutor, offering the judge, by way of conduct or directly, all the facts available to prove the assertions and amount of harm and detriment caused by the crime.

193. In cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are complemented and enhanced by the obligations arising for States parties from a specific Inter-American treaty, the Convention of Belem do Pará. Article 7(b) of this Convention specifically obliges the States parties to apply due diligence to prevent, punish and eradicate violence against women. Thus, when an act of violence against a woman occurs, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society’s obligation to reject violence against women and the State’s obligation to eliminate it and to ensure that victims have confidence in the State institutions for their protection.

194. On other occasions, this Court has defined the guiding principles that must be observed in criminal investigations into human rights violations, and these may include, inter alia: recovery and preservation of probative material in order to assist in any potential criminal investigation of the authors; identification of possible witnesses and obtaining their statements, and determination of the cause, form, place and time of the act investigated. In addition, the scene of the crime should be examined thoroughly, and rigorous tests should be performed by competent professionals, using the most appropriate procedures. [FN217] In cases of violence against

women, several international instruments describe and illustrate the enhanced State obligation to investigate them with due diligence. [FN218] Among other requirements, in the course of a criminal investigation for rape: i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence; ii) the victim's statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary; iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape; iv) a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes; v) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.

[FN217] Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Exceptions, Merits, Reparations, and Costs. Judgment of June 7, 2003. Series C No. 99, para. 128; Case of Garibaldi, supra note 195, para. 115, and Case of González et al., ("Cotton Field"), supra note 15, para. 300. [FN218] Cf. United Nations Office of the High Commissioner for Human Rights, Istanbul Protocol, supra note 36, inter alia, paras. 67, 77, 89, 99, 101 to 103, 155, 162, 163, 170, 171, 224, 225, 260, 269, and 290, and W.H.O., Guidelines for medico-legal care for victims of sexual violence, supra note 36, inter alia, pages 17, 30, 31, 34, 39 to 44, and 57 to 74.

195. In the present case, in addition to the facts that the State has acknowledged (supra paras. 16 and 18), the Court finds that, inter alia, the following omissions and errors in the investigations have been proven:

- i) An official of the Civil Public Prosecutor's Office did not want to receive Mrs. Fernández Ortega's complaint; this situation required the intervention of another government employee to ensure that the former complied with his legal obligations; [FN219]
- ii) Mrs. Fernández Ortega, who did not speak Spanish at the time of the incident, was not provided with an interpreter, but had to be assisted by an acquaintance. In the Court's opinion this was inappropriate to respect her cultural diversity; to ensure the quality of the contents of the statement, and to duly protect the confidentiality of the complaint; [FN220]
- iii) It was not guaranteed that the complaint for rape could be made respecting the minimum requisites of consideration and privacy due to a victim of this type of offense; to the contrary, it was made in a place where members of the general public were present, and there was even the possibility that the victim could have been overheard by people she knew; [FN221]
- iv) The scene of the crime was not examined immediately, but took place 12 days after the complaint was filed. [FN222] In addition, there is no record that the authorities in charge of the investigation collected or adopted arrangements to collect direct evidence with regard to other elements, such as the clothes that Mrs. Fernández Ortega was wearing on the day of the incident;

- v) Mrs. Fernández Ortega was not provided with appropriate medical and psychological treatment, and
- vi) The expert evidence was not protected. To the contrary, as Mexico has admitted, the evidence collected during the medical examination of the victim was handled incompetently. The Court notes in particular that this evidence was exhausted, without foreseeing the basic need to perform complementary examinations, such as DNA, to help identify the possible perpetrator.

[FN219] Cf. Sworn statement of Mr. Lugo Cortes before a public notary, supra note 67, folio 1534. Likewise, see also, sworn statement of Mrs. Fernández Ortega before a public notary, supra note 62, folios 948 to 957; sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152, and Statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folio 1501).

[FN220] Cf. Expert opinion by expert Hernández Castillo rendered at the public hearing, supra note 114.

[FN221] Cf. Sworn statement of Mr. Lugo Cortes before a public notary, supra note 67, folio 1534. Likewise, see also, sworn statement of Mrs. Eugenio Manuel before a public notary, supra note 72, folio 1152; statement of Mrs. Fernández Ortega before a public notary, supra note 62, folios 948 to 957, and sworn statement of Mr. Prisciliano Sierra before a public notary, supra note 66, folio 1501.

[FN222] Cf. Certificate of site visit issued by the Common Public Prosecutor's Office, supra note 147, folios 6846 to 6848.

196. Moreover, the Court observes with particular concern that the authorities in charge of the investigation focused their efforts on repeatedly summoning Mrs. Fernández Ortega to declare and not on obtaining and safeguarding other evidence. The Court emphasizes that, in cases of rape, insofar as possible, the investigation must try to avoid revictimization or the re-experiencing of the profoundly traumatic experience each time the victim remembers or testifies about what happened.

197. The Court observes that, in the present case, several of the government employees who intervened initially in the complaint made by Mrs. Fernández Ortega showed a complete absence of motivation, sensitivity, and capacity. Furthermore, the lack of elemental medical resources, and also the failure of the medical officials and the officials of the Public Prosecutor's Office who initially attended Mrs. Fernández Ortega to use an action protocol were especially serious and had negative consequences in regard to the attention merited to the victim and on the legal investigation of the rape.

198. Based on the abovementioned and on the State's partial acknowledgement of responsibility, the Inter-American Court concludes that the State authorities did not act with due diligence in the investigation of the rape of Mrs. Fernández Ortega, which, additionally, exceeded a reasonable time. Consequently, the State violated the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, and Article 7(b) of the Inter-American Convention for the

Prevention, Punishment, and Eradication of Violence against Women, to the detriment of Mrs. Fernández Ortega.

199. In relation to that alleged by the representatives and Commission regarding discrimination in the access to justice on behalf of Mrs. Fernández Ortega, the Court notes that the representatives considered violated the rights to equal protection and non-discrimination in the access to justice of Mrs. Fernández Ortega, recognized in Articles 8 and 25, 24, and 1(1) of the American Convention, whereas the Commission only raised arguments regarding the failure to comply with the latter rule with the respective substantive norms. In this regard, the Court recalls that the general obligations of Article 1(1) refers to the State's responsibility to respect and guarantee "without discrimination" the rights contained in the American Convention, while Article 24 protects the right to "equal protection of the law." [FN223] In other words, if it is argued that a State discriminates in this regard or in the guarantee of a conventional right, then the fact should be analyzed under Article 1(1) of the substantive right in question. If to the contrary, the alleged discrimination refers to unequal protection by the domestic law, then it should be analyzed under Article 24. As such, the alleged discrimination in the access to justice derived from Articles 8 and 25, should be analyzed under the general obligation to respect and guarantee the conventional rights without discrimination, recognized under Article 1(1) of the American Convention.

[FN223] Cf. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 53 and 54. Also cf. Case of Apitz Barbera et al., ("First Court of Administrative Disputes") v. Venezuela. Preliminary Exceptions, Merits, Reparations, and Costs. Judgment of August 5, 2008. Series C No. 182, para. 209; Case of Ríos et al., supra note 46, para. 348, and Case of Perozo et al., supra note 46, para. 379.

200. As it has been established before by the Court, and pursuant to the principles of non discrimination enshrined in Article 1(1) of the American Convention, in order to guarantee access to justice to members of indigenous communities, it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions. [FN224] Moreover, the Court has noted that "States should abstain from, directly or indirectly, creating situations of de jure or de facto discrimination." [FN225]

[FN224] Cf. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, para. 63; Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 178, and Case of Tiu Tojín v. Guatemala. Merits, Reparations, and Costs. Judgment of November 26, 2008. Series C No. 190, para. 96.

[FN225] Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, supra note 194, para. 103.

201. The Court considers that it has been proven that Mrs. Fernández Ortega did not have a translator provided by the State in order for her to present her initial claim and the subsequent expansion of the claim; neither did she receive, in her language, information regarding the actions taken regarding her claim. In order to inform the authorities of that which affected her and to obtain information, she had to turn to someone she knew who spoke Spanish. On the other hand, the State on subsequent occasions when it called upon the victim, offered an interpreter and also informed that it was implementing a program that consisted of training indigenous interpreters in Guerrero. The Court positively assesses both these steps taken by Mexico. Nevertheless, the inability to file a claim in her language implied, in the present case, unequal treatment towards Mrs. Fernández Ortega given her language and ethnicity, thus implying an unjustified infringement to her right to seek justice. Based on the aforementioned, the Court considers that the State did not comply with the obligation to guarantee, without discrimination, access to justice in the terms of Article 8(1) and 25 of the American Convention, in relation to Article 1(1) of the same instrument.

202. In addition, the Commission and the representatives alleged the violation of the Inter-American Convention to Prevent and Punish Torture. Among other reasons, they mentioned that the authorities did not investigate the rape as a crime of torture. The Court understands that this allegation refers, fundamentally, to the legal definition under which the rape suffered by Mrs. Fernández Ortega was investigated. Article 1 of said treaty establishes the general obligation to prevent and punish torture. Article 6, in its regard, establishes the obligation to make torture a criminal offense under domestic law, establishing severe penalties for such acts. Finally, Article 8 of said Convention establishes, in general, the obligation to open, ex officio and immediately, an impartial criminal investigation into any alleged act of torture. The Court finds that, in the present case, the State did not fail to comply with Articles 1, 6, and 8 of the mentioned Convention, in investigating the facts to the detriment of Mrs. Fernandez Ortega, which given its characteristics constituted an act of torture, qualifying it as an act of rape. In effect, the investigation under alleged rape is in accord with the facts of the complaint in the specific case and with the general obligation that acts of torture constitute crimes in domestic law and with the requirement of the severity of the punishment. In this sense, the Court observes that rape is a crime defined in the Criminal Code of the state of Guerrero [FN226] and in the Federal Criminal Code of Mexico, [FN227] which establish penalties of eight to sixteen years' imprisonment and eight to fourteen years' imprisonment, respectively. Based on the foregoing, it is not necessary to make an additional ruling in this regard, nor on the other alleged violations based on the same facts and that were analyzed under other conventional obligations.

[FN226] The Criminal Code of the state of Guerrero establishes:

Article 139: Whomever, by means of physical or moral violence copulates with a person of any gender, will be punished by eight to sixteen years of prison and sixty to four hundred days fine.

Article 141: A punishment of eighteen to twenty-two years of prison and one hundred and twenty to five hundred days fine will be imposed: [...] III. When the copulative act is carried out by the perpetrator, in the circumstances of his or her employment, when carrying out a public charge or when under carried out while executing professional responsibilities. The agent will also be sentenced to dismissal of public charges or employment and disqualification of eight years.

[FN227] The Federal Criminal Code of Mexico establishes:

Article 265: Whomever, by means of physical or moral violence copulates with a person of any gender, will be punished by eight to fourteen years of prison.

Article 266 bis: The punishment foreseen for sexual abuse and rape shall increase, by half at a minimum and maximum, when: [...] III. The crime is committed by a person carrying out a public charge or employment or in the course of employment, using the means or under the circumstances of the professional role. In addition to the prison sentence, the convicted individual will be disqualified from his or her charge or employment or suspended for a term of five years from the exercise of said profession.

D. Request of the State regarding specific aspects of the investigation

203. Lastly, in response to the State's request (supra para. 17), the Court will rule on the five aspects mentioned here:

A. Scrupulous respect for procedural guarantees

The State affirmed that the alleged victim: i) had, at all times, the possibility of being heard by the ministerial (investigative) authorities and has had full access to the case files; ii) was summoned on numerous occasions with the guarantee of interpretation into her language and the presence of her representatives, and iii) received explanations on the nature of the competences in the case in person and through her representatives, and response was given to her request that the Office of the Attorney General of the Republic should participate in the procedures undertaken. In addition, "the State has tried to respond to the alleged victim's requests, even by establishing an Inter-disciplinary group with a gender perspective."

B. Interventions with a gender perspective

The State indicated that it had "implemented a collaboration mechanism with a gender perspective among different ministerial authorities," "to support the measures taken by the [P]ublic [P]rosecutor's [O]ffice of the state of Guerrero" and in order "to avoid revictimization and to respond to the request [of Mrs. Fernández Ortega] that the Office of the Attorney General of the Republic be involved in the investigations." Consequently, it asked the Court to positively assess "that this interdisciplinary group with a gender perspective was, at all times, fully available to travel to the places indicated by the representatives to take measures and keep communication channels open in order to respond to specific requests concerning the investigations." This group even obtained Mrs. Fernández Ortega's collaboration to make the artist's sketch.

C. Reiterated failure of the victim to assist in the investigations

The State asked the Court to examine “its willingness to [...] continue the investigations, [considering] the repeated invitation made [...] to the alleged victim to obtain her participation in the investigations.” Mrs. Fernández Ortega was invited to testify “on up to [twenty-one] occasions and in another [three], she was officially asked to propose dates to take part in procedures.” Based on the foregoing, Mexico asked that the Court consider “to what extent the lack of collaboration by Mrs. Fernández Ortega and her representatives has had an impact on the progress of the investigations.”

D. The actions of the authorities within the legal framework in force

The State argued that: i) “the investigations have been conducted in strict compliance with the legal powers of each of the [P]ublic [P]rosecutor’s [O]ffices that have examined the case”; ii) Mrs. Fernández Ortega “has, at all times, been ensured the right that her claims are attended by authorities previously established by law”; iii) “a crucial factor for the transfer of the jurisdiction of the Civil Public Prosecutor’s Office to the Military Public Prosecutor’s Office and vice versa, was, precisely, the failure of Mrs. Fernández Ortega to participate in the implementation of the measures necessary to identify those responsible,” and iv) Mrs. Fernández Ortega’s failure to appear [...] gave rise to a vicious circle in which the competence of [the investigating authorities] was contested, at the same time as the authorities were not provided with the necessary information to define the type of offense that was being investigated.” Accordingly, Mexico asked the Court to decide “to what extent it was valid for the victims to oppose, based on the argument of competence, the implementation of measures that were fundamental for the investigation, and for which all necessary guarantees had been ensured.”

E. Promotion of the investigation procedures by the State

The State affirmed that it had promoted the investigation “at all times” and specified that “it had obtained the testimony of the victim and her witnesses, and of all the soldiers from the ‘Méndez’ Operations Base; geo-referencing studies had been carried out that allowed the location of military personnel at the time of the facts to be determined, [and] medical assessments, among other measures.” Mexico asked the Court to assess “the measures taken in the course of the proceedings.”

204. First, the Court notes that some of these affirmations, such as those concerning the action of the authorities within the legal framework in force and the scrupulous respect for the procedural guarantees of Mrs. Fernández Ortega, have already been dealt with, substantially, in this section of the Judgment. The Court recalls that, irrespective of its conformity with domestic law, the intervention of the Military Criminal Public Prosecutor’s Office does not comply with the guarantees arising from the American Convention (*supra* paras. 175 to 177). Furthermore, regarding respect for procedural guarantees, the Court appreciates some of the efforts made by the State, including the provision of an interpreter on some of the occasions in which Mrs. Fernández Ortega was summoned to testify or participate in procedures. Notwithstanding, as the Court has indicated, the actions taken by the State have not been sufficient and, in some cases, not even opportune, to investigate the rape with due diligence, errors which were also partially acknowledged by Mexico. Based on the foregoing, the Court does not find any reason to make additional findings in this regard.

205. In addition, this Court positively assesses the establishment of an interdisciplinary group with a gender perspective composed of female personnel from the Office of the Attorney General of the Republic adjoined to different institutions, in order to monitor the measures undertaken,

support the victim and, insofar as possible, lessen her revictimization. The Court also appreciates that some progress was made while this group was functioning; for example the artist's sketch with the aid of Mrs. Fernández Ortega, a measure that could lead to the identification of the possible authors of the rape. The Court reiterates that it is fundamental to provide support to a victim of rape from the onset of the investigation in order to ensure safety and an appropriate framework for referring to the act suffered and to facilitate participation, as simply and as carefully as possible, in the investigation procedures. The Court observes that, even though said group with a gender perspective played a positive role, it began its work in January 2007, as a result of a commitment made by the State regarding a hearing of this case held before the Inter-American Commission on October 12, 2007; in other words, almost five years after the facts had been reported. [FN228]

[FN228] Cf. Answer to the application (case file on the merits, tome II, folio 514).

206. Regarding the failure of Mrs. Fernández Ortega to present herself for the summons to testify, this Court understands that, when investigating criminal acts, even when the burden of the investigation should not rest on the victim, his or her participation may be necessary. In this regard, the Court appreciates the State's effort to summon Mrs. Fernández Ortega to testify on various occasions and, thus, advance the investigation. Nevertheless, irrespective of the discrepancies concerning the number of summonses and the alleged errors in the writs of summons, the Court recalls its previous observations with regard to repeatedly summoning a victim of sexual offenses to testify (*supra* paras. 194 and 196) and also finds it is evident that a victim of rape attributed to soldiers feels profound fear and apprehension when summoned to appear by the Military Public Prosecutor's Office, irrespective of whether this authority will conduct the procedure directly or carry it out using officials of the Civil Public Prosecutor's Office.

207. Lastly, the Court assesses positively the different investigative measures mentioned by the State. The efforts indicated must be continued by the Civil Public Prosecutor's Office so that the investigation is concluded as diligently and urgently as possible, in order to determine the truth of the facts and investigate and, if appropriate, punish those responsible for the rape of Mrs. Fernández Ortega.

E. Alleged threats and harassment to those persons connected to the case

208. The Commission alleged that the acts of harassment and threats supposedly suffered by Mrs. Fernández Ortega and her family, among other people, related to the present case "illustrate the absence of justice and absence of adequate measures on behalf of the State." It recalled the adoption of precautionary and provisional measures and indicated that the threats to the life and personal integrity of the victims and the acts of harassment had worsened during the two months prior to the presentation of the application. The persistence of the situation of vulnerability, fear, and threats means that the State should adopt specific measures to resolve this situation.

209. The representatives argued that Mrs. Fernández Ortega and her family “have had to face constant threats and attacks on their integrity, merely because they asked for justice [...]. The most serious of these acts was the murder of [...] her brother, Lorenzo Fernández Ortega [...]. It is alleged that his death was closely related to the search to obtain justice for the rape [of Mrs. Fernández Ortega].” Mr. Prisciliano Sierra had also “been the victim of threats and harassment, as a result of his participation in advancing the investigation into the facts.” With regard to her brother, Ocotlán Fernández Ortega, his participation in OPIM “has resulted in his being the victim of harassment and surveillance, which has meant that recently he has had to abandon his community because he fears that the threats could be acted upon as in the case of his brother Lorenzo.” Following submission of the brief on pleadings and motions, they referred to threats against Otilia and Andrea Eugenio Manuel, both members of OPIM, and in their final written arguments, they narrated a series of threats suffered by Ana Luz Prisciliano Fernández on May 17, 2010. They indicated that the threats and harassment “constitute a violation of judicial guarantees and judicial protection, because they are strictly related to the search for justice by [...] Mrs. Fernández Ortega and her representatives.” The representatives concluded that “until the State adopts effective measures to ensure that the victim can exercise her right of access to justice safely, and without threats because she is doing this, her rights [...] as established in Articles 8 and 25 of the Convention are being violated.”

210. The State indicated that “during the investigation of the facts reported by Mrs. Fernández Ortega, no elements were found that reveal [...] persecution, discrimination, false accusations or threats committed by State agents against the alleged victim or her family.” To the contrary, the alleged victim and her family “possess all the remedies established in domestic law to denounce possible accusations or threats. In addition, it had implemented the necessary measures to protect Mrs. Fernández Ortega and her family, such as the provisional measures in force [in this case].” Furthermore, it indicated that “the alleged threats against OPIM and the members of the Tlapaneca community exceed the *litis* in this case.” Mexico concluded that the provisional measures in force are designed to protect rights distinct from those in dispute in this case, they were not indicated in the application, and they do not constitute supervening facts. (*supra* para. 68).

211. Regarding the alleged facts, the Court has verified that in 2007, Mr. Prisciliano Sierra filed a complaint for the offenses of injuries, threats and “bearing” forbidden weapons, owing to events that took place on June 30, 2007. [FN229] In addition, Mrs. Eugenio Manuel reported a series of acts of harassment and threats against her that took place between 2002 and the date of the complaint. [FN230] Furthermore, the evidence in the case file reveals that Lorenzo Fernández Ortega was found dead on February 10, 2008, in Ayutla de los Libres, and that there were numerous injuries to his body. During the procedure in which his body was returned to his family, a complaint was filed for the crime of murder. [FN231]

[FN229] Cf. Office of the Public Prosecutor of the Common Jurisdiction of the Allende Judicial District. Opening of Criminal Action 52/2008-II, *supra* note 30, folios 5589 and 5590

[FN230] Cf. Preliminary Investigation ALLE/SC/01/065/2006. Order of criminal action and reparation for harm, *supra* note 30, folios 5649 to 5669.

[FN231] Cf. Office of the Public Prosecutor of the Common Jurisdiction of the Allende Judicial District. Preliminary Investigation ALLE/SC/01/032/2008 for homicide, supra note 30, folios 5714 to 5725

212. Mrs. Fernández Ortega and Mr. Prisciliano Sierra mentioned in their declarations before a public notary the specific acts that took place in 2007 and in February 2009, in which soldiers had harassed Mr. Prisciliano to withdraw the complaint, and destroyed the family's harvest. [FN232]

[FN232] Cf. Sworn statement of Mr. Prisciliano Sierra made before public notary, supra note 66, folio 969, and sworn statement made before public notary by Mrs. Fernández Ortega, supra note 62, folios 1482 to 1491.

213. From the foregoing, it is clear that specific acts of harassment and threats have occurred against Mrs. Fernández Ortega and her next of kin, as well as other persons. Nevertheless, these facts are being considered by the Court by means of the provisional measures ordered opportunely, (supra para. 15) and they do not form part of the purpose of the litigation of the present contentious case.

214. Notwithstanding the foregoing, the Court finds that they may not exist any obstacles to the search for justice in this case and, thus, the State must continue adopting all necessary measures to protect the victims and other people connected to this case, and guarantee their safety, ensuring that they can exercise their rights to judicial guarantees and to judicial protection without restrictions.

X. ARTICLE 16 (FREEDOM OF ASSOCIATION) [FN233] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN233] Article 16 of the Convention establishes:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
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215. In the written brief on pleadings and motions, the representatives asked the Court to declare that Mrs. Fernández Ortega's right to freedom of association had been violated. They indicated, inter alia, that she became a member of the Independent Organization of the Mixtecos and Tlapanecos [Organización Independiente de los Pueblos Mixtecos y Tlapaneco] (hereinafter "OIPMT, organization that preceded OPIM") in 2000, "because of the lack of justice with regard

to the murder of her father [...], and also to fight for better living conditions for the members of the indigenous communities in her region.” Owing to her participation in OIMPT and her work in defense of the rights of indigenous women, victims of violence in her community, Mrs. Fernández Ortega “was viewed by members of the Army as part of the ‘enemy’” and “[o]wing to her condition as a woman, she was regarded as an object and raped.” Furthermore, while investigating the case, the Military Public Prosecutor’s Office showed a tendency to “discredit and criminalize [Mrs. Fernández Ortega], her husband and her organization,” even linking her, together with her husband, “to criminal acts merely because they belonged to OIMPT.” They underscored that “the accusations against OIMPT occurred in the context of the criminalization of members of social organizations on the assumption that they were linked to armed insurgent movements or to activities connected to drug-trafficking.” The rape of Mrs. Fernández Ortega “was intended to send a message to intimidate her [and also] the other members of OIMPT, to persuade them to cease their efforts to claim their rights and denounce military abuse, and as a warning of what could continue to happen.” Mrs. Fernández Ortega “was not only raped as a form of serious intimidation against her organization [...] but also [given] her participation in the organization, she did not merit effective protection by the law.”

216. During the public hearing, the representatives reiterated that “one of the reasons Mrs. [...] Fernández Ortega was raped was because it was an intimidation strategy owing to her membership in [said] organization.” Lastly, in their final arguments, they reiterated their request that the State be declared responsible for violating the right to freedom of association, even though they modified their arguments partially, affirming that: i) the rape took place at a time when OPIM had documented and denounced the rape of another Me’paa woman perpetrated by soldiers. Hence, “the rape of [Mrs.] Fernández Ortega is understood to be a consequence of the complaint by Valentina Rosendo Cantú, which evidently affected and disrupted the way in which [Mrs.] Fernández Ortega participated in her organization, as it cannot be ruled out that her involvement with OPIM was one of the reasons that she was attacked”; ii) at the time of the rape, Mrs. Fernández Ortega was taking part in the initial organization of the women of her community, as revealed by specific declarations and expert opinions; iii) the rape had an intimidating effect, “obviously, [Mrs.] Fernández Ortega’s rape impeded her participation in the organization, as well as that of other women, and this was due to the impunity in the case and to the increase in harassment and threats against the victim, her family, and those who have accompanied her process of seeking justice,” and iv) the rape of Mrs. Fernández Ortega forms part of the context of violence suffered by the grass-roots indigenous organizations of Guerrero, such as OPIM.

217. In summary, the State alleged that the Court is unable to examine the violation of the right to freedom of association in this case, because “the petitioners may not invoke facts that are distinct from those contained in the Commission’s application” and that brief “never mentions a policy of harassment against OPIM or other organizations for the defense of human rights in Guerrero. The situation of OPIM [...] is not part of the litis”; in addition, “neither the alleged actions against OPIM, nor the alleged violation of Article 16(1) were indicated at any time by the petitioners throughout the processing of the case before the Commission,” so that “[a]t this stage of the proceedings, to admit the claim that the State violated Article 16 of the Convention to the detriment of members of that organization would amount to depriving the State of its right to be heard in a fair trial.” Despite the foregoing, the State, also indicated that it had not violated Mrs.

Fernández Ortega’s right to freedom of association because it had complied with all the positive and negative obligations deriving from it. Among other measures, the State had adopted precautionary and provisional measures with regard to the individuals linked directly and indirectly to the case, initiated several preliminary inquiries, and held working meetings with the representatives. Additionally, the right to freedom of association is extensively guaranteed by law and a petition for amparo [protection of constitutional rights] can be filed to achieve the restitution of the right if any possible act of an authority unduly limits it. Finally, the State referred to other initiatives to protect and promote human rights defenders, such as the mechanisms for dialogue with their organizations. Based on the abovementioned, Mexico asked the Court to withhold itself from examining the alleged violation of freedom of association or to “declare that the violation [of this] right has not been proven.”

218. The Court observes that, in its application, the Commission did not argue the alleged violation of the right to freedom of association; rather these allegations were only made by the representatives. This Court has established that the alleged victims, their next of kin, or their representatives may invoke rights other than those included in the Commission’s application, based on the facts that the latter has presented. [FN234]

[FN234] Cf. The “Five Pensioners” v. Perú, supra note 140, para. 153; Case of Ríos et al., supra note 46, para. 42, and Case of Perozo et al., supra note 46, para. 32.

219. In its application, the Commission described facts relating to the rape perpetrated against Mrs. Fernández Ortega and the failure to investigate it, and indicated that the rape took place in a context of the violation of the human rights of indigenous people in the region of Guerrero attributed to soldiers present in the area. However, the alleged participation of Mrs. Fernández Ortega in OPIM, her involvement in the defense of the women of her community, and the prevention of or decrease in the participation of women in OPIM as a result of Mrs. Fernández Ortega’s rape do not appear in the application. Since the representatives’ arguments concerning the alleged violation of Mrs. Fernández Ortega’s right to freedom of association are linked to these facts that do not appear in the application, the Inter-American Court will not examine them and will not make any further observations in this regard.

XI. REPARATIONS (Application of Article 63(1) of the Convention [FN235])

[FN235] Article 63(1) of the American Convention states:

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

220. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to repair it adequately [FN236] and that this provision “embodies a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.” [FN237]

[FN236] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Chitay Nech et al., supra note 18, para. 227, and Case of Manuel Cepeda Vargas, supra note 18, para. 211.

[FN237] Cf. Case of Castillo Páez v. Perú. Reparations and Costs. Judgment of November 27, 1998. Series C No. 43, para. 43; Case of Chitay Nech et al., supra note 18, para. 227, and Case of Manuel Cepeda Vargas, supra note 18, para. 211.

221. This Court has established that reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage. Consequently, the Court must respect all these factors to ensure that its ruling is appropriate and in keeping with the law. [FN238]

[FN238] Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 191, para. 110; Case of Radilla Pacheco, supra note 33, para. 362, and Case of the Dos Erres Massacre, supra note 20, para. 227.

222. The Court will proceed to examine the claims submitted by the Commission and the representatives, together with the State’s arguments, so as to order measures designed to repair the damage caused to the victims. Regarding the State’s arguments, the Court observes that it presented specific arguments with regard to only some of the requested measures of reparation. Otherwise, in general, Mexico asked the Court to reject “any claim for reparation presented by the [Commission] or the petitioners.” In addition, it asked that any measures ordered “should be designed to repair the violation committed and not to make the victims more rich or provide double reparation,” and that any reparations should be those “that can be required under international law and [the Court’s] jurisprudence.” Lastly, it asked that the public policy measures implemented by the State be considered guarantees of non-repetition.

223. The Court recalls that the victim in the present case is an indigenous woman, in a particularly vulnerable situation, and this will be taken into account in the reparations awarded in this Judgment. Furthermore, the Court finds that the obligation to make reparation to a victim belonging to an indigenous or tribal community may call for measures that encompass the community [FN239] (infra paras. 243, 244, and 267 to 270).

[FN239] Cf. Aloeboetoe et al. v. Suriname. Reparations and costs. Judgment of September 10, 1993. Series C. No. 15, paras. 96 and 97; Case of the Plan de Sánchez Massacre v. Guatemala.

Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 86, and Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 15, 2005. Series C No. 124, para. 194.

A. Injured party

224. Under Article 63(1) of the American Convention, anyone declared a victim of the violation of any right embodied therein is considered an injured party. In the present case, the victims are Mrs. Fernández Ortega, her husband, Mr. Prisciliano Sierra, and their children, Noemí, Ana Luz, Colosio, Nélica and Neftalí, all bearing the surname of Prisciliano Fernández; accordingly, they will be considered beneficiaries of the reparations ordered by this Court.

B. Measures of satisfaction, rehabilitation, and guarantees of non-repetition

i) Obligation to investigate the facts and to identify, prosecute, and eventually punish those responsible

225. The Commission and the representatives substantially coincided in what regards the obligation to investigate the facts, and where applicable, to punish those responsible. In sum, they requested the Court to order the State to carry out an investigation with due diligence, on the facts of the present case, so as to ascertain the historical truth of what occurred, identify those responsible, and apply the appropriate punishment. Moreover, they noted that the victim and her next of kin should have full access and means to act in all the stages of the investigation according to domestic law and the American Convention. In addition, they requested that security be guaranteed to the victim, her next of kin, and the representatives in relation to the threats and persecution experienced as a consequence of the search for justice.

226. The Commission added that the State must adopt all the legal and administrative measures necessary in order to complete the investigation in the ordinary forum, forwarding to it all of the prior antecedents of the military investigation. Furthermore, it indicated that the State must investigate and punish all those responsible for the obstruction of justice, cover-up, and impunity that have prevailed in relation to this case.

227. The representatives added that the State must adopt affirmative measures that guarantee access to justice of Mrs. Fernández Ortega, taking into account the cultural, social, economic, and other obstacles faced and offer the means to overcome them. Finally, they also requested administrative sanction of the public agents responsible for the irregularities verified in the investigation.

228. The Court has established, bearing in mind the State's partial acknowledgement of responsibility, that the investigation of the rape of Mrs. Fernández Ortega was not conducted to date with due diligence or under the appropriate jurisdiction and, consequently, that Mexico has violated the rights to judicial guarantees and to judicial protection established in Articles 8 and 25 of the American Convention (supra para. 175 to 183 and 191 to 201). Consequently, as it has on other occasions, [FN240] the Court finds that the State must efficiently conduct the criminal

investigation into the facts of this case effectively and with due diligence, in order to determine the corresponding criminal responsibilities and apply the punishments and consequences established by law. This obligation must be complied with within a reasonable time, respecting the criteria mentioned above concerning investigations in this type of case. [FN241]

[FN240] Cf. Velásquez Rodríguez, supra note 27, para. 174; Case of Chitay Nech et al., supra note 18, para. 235, and Case of Manuel Cepeda Vargas, supra note 18, para. 216.

[FN241] Cf. Case of Radilla Pacheco, supra note 33, para. 331. See Case of the Dos Erres Massacre, supra note 20, para. 233; Case of Chitay Nech et al., supra note 18, para. 235, and Case of Manuel Cepeda Vargas, supra note 18, para. 216.

229. In particular, the State must guarantee, through its competent institutions, that the preliminary investigation which is being conducted into the facts that constituted the rape of Mrs. Fernández Ortega remain within the ordinary jurisdiction. Furthermore, if new criminal actions based on the facts of this case are filed against some of those presumably responsible who are or have been members of the Armed Forces, the authorities in charge of the case must ensure that they are conducted under the ordinary jurisdiction and, in no circumstances, under the military forum. [FN242]

[FN242] Cf. Case of Radilla Pacheco, supra note 33, para. 332.

230. The Court reiterates that during the investigation and prosecution, the State must ensure the victim full access and capacity to act at all stages. In a case such as this in which the victim, a woman and indigenous person, has had to face various obstacles in order to access justice, the State has the obligation to continue to offer the means by which the victim may fully access and participate in all the proceedings of the case and, to this end, it must ensure that an interpreter is provided, all support with a gender perspective, based on her circumstance of special vulnerability. Lastly, if Mrs. Fernández Ortega offers her consent, the results of the proceedings must be disseminated, so that Mexican society learns the truth about the incident.

231. In addition, on other occasions, [FN243] the Court has ordered the State to initiate disciplinary, administrative or criminal actions under its domestic law with regard to those responsible for the different procedural and investigative irregularities in a case. In the present case, the Court notes that Mexico advised that an administrative investigation had been conducted with regard to the experts who exhausted the samples, and they were sanctioned. For their part, the neither the Commission nor the representatives, whom requested said measure, produced any evidence to the contrary nor did they prove the impossibility of providing it. [FN244] Consequently, the Court does not need to order any measure of reparation in this regard. On the other hand, taking into account that in this case the agent at the Public Prosecutor's Office caused complications when receiving the complaint filed by Mrs. Fernández Ortega (supra paras. 85 and 195), the Court orders the State to examine this fact and the conduct of the respective official, in keeping with the pertinent disciplinary norms.

[FN243] Cf. Case of the Dos Erres Massacre, *supra* note 20, para. 233, subsection d.

[FN244] The Commission only noted that it had not received the relevant information of the State despite it having been requested. (case file on the merits, tome I, folio 26).

232. Finally, in regard to the request to guarantee the security of the victims, the next of kin, and the representatives, the Court recalls that the provisional measures ordered opportunely by this Court remain in force. (*supra* para. 15).

ii) Adaptation of domestic law to the international standards of justice

233. The Commission asked that the Court to order Mexico to limit and restrict the scope of the military jurisdiction, excluding it from hearing cases in which human rights violations have been committed and, particularly, cases of sexual abuse.

234. On its behalf, the representatives asked the Court to order the State to reform Article 13 of the Political Constitution and Article 57 of the Code of Military Justice in order to establish clearly and without any ambiguity that the military system of justice must abstain, whatsoever the circumstances, from hearing cases of human rights violations attributed to members of the Mexican armed forces, whether or not they are on active service. Furthermore, they asked the Court to order the Mexican State to carry out legislative reforms in order to provide the victims of an offense or the aggrieved parties with access to an effective remedy for the protection of their rights, and specifically to contest the submission of their case to the military jurisdiction.

235. In the Court's opinion, it is not only the enactment or the suppression of domestic legal provisions that guarantee the rights contained in the American Convention. Pursuant to the obligation established in its Article 2 of said instrument, the State must also develop practices leading to the effective observance of the rights and freedoms embodied in the Convention. The existence of a norm does not, in and of itself, guarantee that its application will be adequate. The application of the norms or their interpretation, as jurisdictional practices and expressions of the State's public order, must be adapted to the objective sought by Article 2 of the Convention. In practical terms, as the Court has already established, the interpretation of Article 13 of the Mexican Constitution must be coherent with the constitutional and the treaty-based principles of due process and access to justice contained in Article 8(1) of the American Convention and the pertinent provisions of the Mexican Constitution. [FN245]

[FN245] Cf. Case of Radilla Pacheco, *supra* note 33, para. 338.

236. In its jurisprudence, the Court has established its awareness that domestic authorities are subject to the rule of law and, consequently, that they are obliged to apply the provisions of the laws that are in force in the legal code. [FN246] Nevertheless, when a State is a party to an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to such a treaty, and this obliges them to ensure that the effects of the provisions

of the Convention are not diminished by the application of norms contrary to its object and purpose. The Judicial branch must exercise control ex officio of the harmonization of the domestic norms with the American Convention, evidently within the framework of their respective competences and the corresponding procedural rules. In this task, the Judicial branch should bear in mind not only the treaty, but also the interpretation of it made by the Inter-American Court, definitive interpreter of the American Convention. [FN247]

[FN246] Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 124; Case of La Cantuta v. Perú. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 173, and Case of Radilla Pacheco, supra note 33, para. 339.

[FN247] Cf. Case of Almonacid Arellano, supra note 246, para. 124; Case of Boyce et al. v. Barbados. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2007, Series C No. 169, para. 78, and Case of Radilla Pacheco, supra note 33, para. 339.

237. Hence, the constitutional and legislative interpretations concerning the criteria for the personal and subject matter jurisdiction of the military jurisdiction in Mexico needs to be adapted to the principles established in the Court's jurisprudence, which have been reiterated in the present case. This implies that, irrespective of the reforms to the law that the State may adopt (infra paras. 239 and 240), in this case, it is incumbent on the judicial authorities, based on the "control of the harmonization of domestic law with the Convention," to order immediately and ex officio that the facts be heard by the ordinary criminal justice system.

238. On the other hand, the Court recalls that it has already found, in the case of Radilla Pacheco, that it is not necessary to order the amendment of the normative content that regulates Article 13 of the Political Constitution of the United Mexican States.

239. Furthermore, in Chapter IX of this Judgment, the Court has declared that Article 57.II.a of the Code of Military Justice is incompatible with the American Convention (supra paras. 178 and 179). Consequently, the Court reiterates to the State its obligation to harmonize, within a reasonable time, said provision with the international standards in this regard and with the Convention, in conformity with what is established in this Judgment.

240. Finally, pursuant to that established in Chapter IX of this Judgment, Mrs. Fernández Ortega did not have an appropriate and effective remedy to contest the intervention of the military justice system (supra paras. 180 to 183). As a consequence, Mexico must adopt, also within a reasonable time, the relevant legislative reforms to allow those affected by the intervention of the military forum to have available an effective remedy to contest its jurisdiction.

iii) Public act of acknowledgement of responsibility

241. The Commission asked the Court to order the State to publically acknowledge its responsibility for the harm caused.

242. The representatives also asked that an act should be held during which the State would publically acknowledge its responsibility and the President of Mexico would offer an apology for the violations committed. This act must be translated to Me’paa language and held with “coverage by the principal state media.” In addition, they asked that the act should be carried out in consideration of the cultural context and according to criteria established by the authorities of the victim’s community and in keeping with her wishes, and she should indicate the place where the act should be held among other particularities. The representatives emphasized that Mrs. Fernández Ortega and her family must have a central role in the planification of the act.

243. The Court recalls that the State made a partial acknowledgement of its international responsibility at the public hearing held in this case (supra paras. 16 and 18) and that, in her expert opinion provided before this Court, expert witness Hernández Castillo indicated that, for the indigenous communities of Guerrero, it was particularly important that the author of a wrongdoing acknowledge his action publically. In particular, she noted that, in community justice proceedings before the community authorities, acknowledgement is the first step in “healing” the effects in the fabric of the community. [FN248]

[FN248] Expert opinion rendered by expert Hernández Castillo during the public hearing, supra note 114.

244. The Court has determined that the State’s acknowledgement of partial responsibility before the Court is a positive contribution to the development of these proceedings and to the exercise of the principles that inspire the American Convention (supra para. 25). However, as in other cases, [FN249] for this acknowledgement to achieve its full effect, the Court considers that the State must organize a public act of acknowledgement of international responsibility in relation to the facts of the present case. During this act, reference should be made to the human rights violations declared in this Judgment. The act should be carried out in a public ceremony, held in the Spanish and Me’paa languages, in the presence of senior authorities of the Nation and of the state of Guerrero, the victims in this case, and authorities/members of the victims’ community. The State, together with Mrs. Fernández Ortega and/or her representatives, must agree on how the public act of acknowledgement is to be organized, as well as other details, such as the place and date. If Mrs. Fernández Ortega gives her consent, this act should be broadcast by a radio station of the state of Guerrero. The State has one year from the notification of this Judgment to carry out said act.

[FN249] Cf. Case of Kawas Fernández v. Honduras, supra note 91, para. 202; Case of Anzualdo Castro, supra note 90, para. 200, and Case of González et al. (“Cotton Fields”), supra note 15, para. 469.

iv) Publication of the Judgment

245. The Commission asked that the Court order the State to publish the Judgment in a national newspaper.

246. The representatives asked the Court to order the publication of the pertinent parts of the Judgment, in the Spanish and the Me'paa languages, in both the Official Gazette of Guerrero and in a newspaper with national circulation, and that it be disseminated in both languages by a radio station with coverage in the community from which the victim originated and in the community in which she now lives, at least four times with an interval of two weeks between each broadcast.

247. As it has ordered on other occasions, [FN250] the Court considers that, as a measure of satisfaction, the State must publish once, in Spanish, in the Official Gazette, paragraphs 1 to 5, 11, 13, 16 to 18, 24, 25, 78 to 89, 117 to 131, 136 to 138, 143 to 149, 157 to 159, 175 to 183, 190 to 198, 200, 201, 223, and 224 of this Judgment, including the titles of each chapter and of the respective section, without the corresponding footnotes, and the operative paragraphs hereto. Moreover, if Mrs. Fernández Ortega authorizes it, the State must: i) publish the official summary issued by the Court in a newspaper with widespread national circulation, in Spanish, and in a newspaper with widespread circulation in the state of Guerrero, in Spanish and Me'paa; [FN251] ii) publish this Judgment in its entirety, [FN252] together with the translation into Me'paa of the official summary, on an appropriate web site of the federal State and of the state of Guerrero, taking into account the characteristics of the publication that has been ordered, and this must remain available for at least one year, and iii) broadcast the official summary, in both languages, on a radio station [FN253] with coverage in Barranca Tecoani. The State has six months from the notification of this Judgment to make the publications and broadcasts indicated above.

[FN250] Cf. *Barrios Altos v. Peru. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, Operative paragraph 5(d); Case of Chitay Nech et al. v. Guatemala. supra note 18, para. 244, and Case of Manuel Cepeda Vargas, supra note 18, para. 220.*

[FN251] Cf. *Case of Chitay Nech et al., supra note 18, para. 244 and 245.*

[FN252] Cf. *Serrano Cruz Sisters v. El Salvador. Merits, Reparations, and Costs. Judgment of March 1, 2005. Series C No. 120, para. 195; Case of Chitay Nech et al., supra note 18, para. 244, and Case of Manuel Cepeda Vargas, supra note 18, para. 220.*

[FN253] Cf. *Yakye Axa Indigenous Community supra note 224, para. 227; Case of Tiu Tojín, supra note 224, para. 108, and Case of Chitay Nech et al., supra note 18, para. 245.*

v) Medical and psychological care for the victims

248. The Commission asked that the Court order the State to adopt measures of medical and psychological rehabilitation for the victim and her next of kin, which should include the design and implementation of a mental health care plan, in consensus with mental health professionals and women victims of rape, for the recuperation, rehabilitation, and full reinsertion back into her community.

249. The representatives asked the Court to order the State to guarantee to Mrs. Fernández Ortega, her husband, and her children, medical and psychological care provided by competent

professionals who are trustworthy for the victims, including the provision of medications as well as costs of transportation and interpreters, as required.

250. During the public hearing, the State indicated that it would consider “the provision of specialized health services for the victim and [her] children.” Nevertheless, in its final written arguments, the State did not offer more specificity in this regard.

251. The Court finds, as it has in other cases, [FN254] that a measure of reparation must be ordered that provides appropriate care for the physical and psychological effects suffered by the victims, which attend to their gender and ethnicity. Consequently, having verified the violations and the harm suffered by the victims in the present case, the Court decides that the State is obliged to provide them, free of charge and immediately, with the medical and psychological care they require. Prior, clear, and sufficient information should be offered to the victims so as to obtain their consent. The treatments should be provided for the time that is necessary, and should include the provision of medication, and where applicable, transportation, interpreters, and other costs that are directly related and strictly necessary.

[FN254] Cf. Case of Barrios Altos, supra note 250, para. 45; Case Chitay Nech et al., supra note 18, para. 255, and Case of Manuel Cepeda Vargas, supra note 18, para. 235.

252. In particular, the psychological or psychiatric treatment must be provided by State personnel and institutions specialized in attending to victims of acts of violence such as those that occurred in this case. If the State does not have this type of service available, it must have recourse to specialized private or civil society institutions. When providing this treatment, the specific circumstances and needs of each victim must be considered, so that they are offered individual and family treatment, as agreed upon by each of them, and following an individual evaluation. [FN255] Lastly, this treatment must be provided, insofar as possible, in the institutions nearest to their place of residence. In the same way, those who requested this measure of reparation, or their legal representatives, have six months as of the notification of this Judgment to inform the State of their specific requests for psychological or psychiatric treatment. The Court highlights the need for the State and the representatives to offer their best collaborative efforts and to provide the victims with all the information necessary for said victims to receive the psychological treatment in order to advance the implementation of this measure in an agreed upon manner.

[FN255] Cf. 19 Tradesmen v. Colombia. Merits, Reparations, and Costs. Judgment of July 5, 2004. Series C No. 109, para. 278; Case of Chitay Nech et al., supra note 18, para. 256, and Case of Manuel Cepeda Vargas, supra note 18, para. 235.

vi) Protocol for the diligent investigation of acts of violence

253. The Commission asked the Court to order the State to design protocols to facilitate and promote the effective, standardized, and transparent investigation of acts of physical, sexual, and psychological violence. They should include a description of the complex nature of the evidence, and details of the minimum evidence that must be collected in order to provide adequate probative grounds, according to the provisions of the Istanbul Protocol.

254. The State reported on the adoption of distinct protocols related to the investigation of violence against women in the state of Guerrero such as the protocols of care to women in situations of violence and of the investigation of crimes of homicide with a focus on feminicides. Moreover, it reported on the publication of two manuals entitled, “Detection Networks, Support and Reference of Cases of Violence Against Indigenous Women of Guerrero,” and “Reference Models of Cases of Gender Violence for the state of Guerrero,” as well as other instruments related to the investigation and attention to violence against women, among others, the “Integrated Model for the Prevention and Attention of Family and Sexual violence,” which is a model used by health units, and the Program of “Medical Attention to Raped Persons.” Likewise, the State provided information on the process of fitting the Istanbul Protocol to the national context through elaboration and application of the Special Medical/Psychological Report for Cases of Possible Torture and/or Abuse, issued by the Office of the Attorney General of the Republic, as well as by publication of institutional guidelines for the application of this Report to be followed by the agents of the Office of the Public Prosecutor of the Federation, and the forensic experts and/or criminal pathologists of the Office of the Attorney General of the Republic. Furthermore, it advised that twenty-nine federative entities had received training on this report and three agencies were in the process of training the public employees of the attorney general’s offices on the implementation of the Istanbul Protocol. In its final written arguments, the State provided information on the elaboration of Mexican Official Norm NOM-046-SSA2-2005 on domestic and sexual violence and violence against women, which contains criteria to prevent and deal with this. This norm establishes various obligations for personal health, among others, to inform the Public Prosecutor’s Office to carry out the corresponding investigations, and it was created pursuant to a friendly settlement with the Inter-American Commission.

255. The Court takes note of the information provided by the State concerning the existence of the mentioned instruments and the training activities that the federative entities have been holding. However, the Court does not have the document on the “national contextualization” of the Istanbul Protocol or on its application in the state of Guerrero. Furthermore, the Court notes the existence of Mexican Official Norm NOM-046-SSA2-2005, which contains criteria for preventing and dealing with sexual abuse and violence against women, as well as detection and investigation standards for health personnel. Nevertheless, the Court notes that despite that in its introduction it states that “with the elaboration of this Mexican Official Norm [the State] complies with the compromises acquired in the international forums” and that this norm was the outcome of an agreement with the Inter-American Commission, Article 8 of said norm establishes that it “does not meet Mexican and international guidelines or recommendations,” namely that it does not conform to international standards. The Inter-American Commission and the representatives did not address any of the instruments indicated by the State.

256. The Court has ordered, in other cases, that the parameters for investigations and for performing forensic analyses be harmonized with international standards. [FN256] In the present

case, the Court finds it necessary that the State continue with a standardized action protocol, for the federal forum and the state of Guerrero, regarding attention and investigation of rape, based on the parameters established in the Istanbul Protocol and in the World Health Organization's guidelines mentioned above.

[FN256] Cf. Case of Gutiérrez Soler v. Colombia. Merits, Reparations, and Costs. Judgment of September 12, 2005. Series C No. 132, para. 110, and Case of González et al. ("Cotton Fields"), supra note 15, para. 502.

vii) Training programs for officials

257. The Commission asked that the Court order the State to develop training programs for government employees in accordance with the Istanbul Protocol, to provide said officials with the necessary scientific and technical elements to evaluate possible situations of torture or cruel, inhuman, or degrading treatment.

258. The State presented information and documentary evidence about the implementation of training programs and courses, as well as operating manuals for officials of the public administration, the judicial branch, and health sector employees. Among other initiatives, Mexico reported that in 2009, a procedure of institutional and social fortification for attention to violence against indigenous women was developed, training government employees of the state of Guerrero in human rights, gender equity, and interculturality. Moreover, the Attorney General of Justice of the state of Guerrero provides training courses in human rights, with the goal of raising awareness amongst the employees on the importance of prevention of sexual assaults, highlighting seminars on criminal investigations of sexual violence, medical forensics, and attention to victims of sexual violence. In addition, during the 2008-2009 period, the General Secretariat of the Government of Guerrero, carried out two training workshop called "Networks of development of detention, support, and reference of gender-based violence cases in indigenous areas of Guerrero" directed, among others, at indigenous authorities and care providers to the violence. Ten workshops on professionalism of public employees of the judicial branch of the state of Guerrero were carried out. Finally, Mexico also made reference to other training initiatives of general reach, including the training of translators in the agencies of the Public Prosecutor's Office in indigenous communities.

259. The Court assesses positively the existence of various actions and training courses developed by the State. In this regard, it considers that they should include the provisions of the Istanbul Protocol and the guidelines of the World Health Organization, and should pay special attention to the response to alleged victims of rape, particularly when they belong to vulnerable groups, such as indigenous women.

260. As it has done previously, [FN257]the Court orders the State to continue implementing permanent training programs and courses on the diligent investigation of cases of the sexual abuse of women that include a gender and ethnicity perspective. These courses must be offered to officials at the federal level and in the state of Guerrero, particularly to officials within the

Public Prosecutor's Office, the judicial branch, the police, and health sector personnel with competence in this type of cases who, owing to their functions, constitute the first line of response to women victims of violence.

[FN257] Case of González et al. ("Cotton Field"), supra note 15, para. 541.

viii) Permanent educational program on human rights within the Armed Forces

261. The Commission asked that the Court order the State to implement permanent educational programs on human rights within the Mexican Armed Forces, for all ranks, which should include special mention of international human rights instruments, specifically those related to the protection of women's rights, inter alia, their right to live without violence, and to non-discrimination.

262. This Court considers it important to develop the State's institutional capacities by training members of the Armed Forces on the principles and norms for the protection of human rights and on the limits to which they should be subject, [FN258] in order to avoid a repetition of acts such as those that occurred in the present case. To this end, the State must implement, within a reasonable period of time, a permanent program or course of obligatory human rights training, that includes, among other topics, the limits in the interaction between military personnel and the civilian population, gender, and indigenous rights, for members of the Armed Forces in all hierarchical ranks.

[FN258] Cf. Case of the Rochela Massacre, supra note 203, para. 303.

ix) Award of scholarships

263. The representatives affirmed that the facts of the case caused the Mrs. Fernandez Ortega's children to stop attending school for one year, that they were absent due to the military presence in the community, and that the two eldest daughters, so as to continue with their studies, had to move to the city of Ayutla, where "they are only able to attend to their education in conditions of 'semi-slavery.'" Based on the aforementioned, the representatives asked the Court to order the State to award scholarships to Mrs. Fernández Ortega's children, those of which should cover their schooling up to and including university level, as well as any expenses arising from their education, including periodic transport to and from their community, should they study outside of it.

264. The Court has established in this Judgment that the facts of the case harmed Mrs. Fernández Ortega's children and this harm continues and has resulted in significant alterations to their lives and also to their domestic relations and their relations with the community, which have affected their personal development (supra paras. 145 to 149). Based on the foregoing, and bearing in mind the representatives' request, the Court finds it appropriate to order as a measure

of satisfaction in this case, as it has in other cases, [FN259] that the State award scholarships in Mexican public establishments to Noemí, Ana Luz, Colosio, Nérida, and Neftalí, all bearing the surname of Prisciliano Fernández, that covers all the costs of their education until the completion of their higher education, whether of a technical or professional nature. The State's compliance with the obligation implies that the beneficiaries must take certain measures to exercise their right to this measure of reparation. [FN260] Consequently, those who requested this measure of reparation, or their legal representatives, have six months from notification of this Judgment, to advise the State of their specific requirements concerning the requested scholarships.

[FN259] Cf. Case of the Gómez Paquiyauri Brothers v. Perú. Merits, Reparations, and Costs. Judgment of July 8, 2004. Series C No. 110, para. 237; Case of Cantoral Huamaní and García Santa Cruz, supra note 91, para. 194, and Case of Valle Jaramillo et al., supra note 137, paras. 227 subsection (f) and 231.

[FN260] Cf. Case of Escué Zapata v. Colombia. Interpretation of the Judgment of Merits, Reparations, and Costs. Judgment of May 5, 2008 Series C No. 178, paras. 27 y 28; Case of Valle Jaramillo et al., supra note 137, para. 229, and Case of Valle Jaramillo et al. v. Colombia. Interpretation of the Judgment of Merits, Reparations, and Costs. Judgment of July 7, 2009 Series C No. 201, para. 38

x) Provisions to enable a community school to function

265. The representatives asked the Court to order the State to provide the indigenous community to which Mrs. Fernández Ortega belongs with the necessary infrastructure for the functioning of a community school to promote and provide education on women's rights, in which Mrs. Fernández Ortega can play an active role and can continue playing the role she had before she was raped. Said center must be administered by the community itself and have the necessary educational resources to function, to be provided by the State, together with the resources for the Center to have expert advice on the human rights of women. In their final written arguments, the representatives modified this request partially and asked that OPIM be provided with resources for the functioning of the community school. They indicated that the location and characteristics of the school would be defined "collectively and gradually with the active participation of the Me'phaa women of OPIM."

266. The Court notes the change in the request initially made by the representatives that the resources should be handed to OPIM. This revised claim for reparation was not made at the appropriate procedural moment; that is, in the written brief on pleadings and motions. Therefore, the Court will not consider it because it is time-barred, but will refer to the initial request submitted by the representatives.

267. In the present case, the Court underscores the importance of implementing reparations that have a community scope and that allow the victim to reincorporate herself into her living space and cultural identity, as well as re-establishing the fabric of the community. Consequently, the Court finds it pertinent that, as a measure of reparation, the State provide the necessary resources for the Me'phaa indigenous community of Barranca Tecoani to be able to establish a

community center, which is set up as a women's center and in which educational activities are held on human rights and women's rights, under the responsibility and management of the women of the community, including Mrs. Fernández Ortega if she so desires. The State must assist State institutions and civil society organizations working in the area of human rights and gender to provide assistance for the community training activities, which must be adapted to the indigenous community's view of the world.

268. On the other hand, the Court recalls that in the public hearing, the expert witness Hernández Castillo made reference to the living conditions of two of the daughters of Mrs. Fernández Ortega, as well as to "many of the other Me'phaa girls" as a consequence of the lack of security on the roads. She reported that "thirty girls from Barranca Tecoani, are currently studying in Ayutla de los Libres because [in said location] there is no middle school. In order to get to the middle school, these girls would have to walk three hours [to the place where they would go to Ayutla via transportation]. The risks of this route have caused the mothers to decide to send their daughters to work with middle class mestizo families in Ayutla de los Libres that take them as domestic labor without salary, [where they work] up to twelve hours daily in exchange for a home, food, and the possibility to have education. Ana Luz, the second daughter [of Mrs. Fernández Ortega], is currently in this situation, and Noemi, her eldest daughter, lived with five families like this, having to move from home to home because of the maltreatment received [there.]" Therefore, the expert witness suggested "the construction of a hostel school where the Me'phaa girls can study safely, without fear of the route taken to get there, the insecurity which they pose, and which has become a space of vulnerability given the rape of [Mrs. Fernández Ortega]." This "would be a direct reparation [in relation] to the state of vulnerability caused by the rape."

269. In addition, in the brief that accompanied the expert report, the expert witness specified, "the proposal for a community school for the promotion and education of the rights of women be substituted for a hostel-school which will be installed and will function in the municipal capital of Ayutla de los Libres. Said hostel-school can function as a dormitory for the daughters of the [Me'phaa] whom are in middle school or high school and at the same time, and at the same time provide a non-formal education on various matters at the hands of the OPIM women."

270. Taking into account the aforementioned, the Court deems it opportune to order that the State adopt measures for the girls of the community of Barranca Tecoani that currently carry out their middle school studies in the city of Ayutla de los Libres, to be provided with housing and a proper diet, in order for them to continue receiving an education at the institutions they attend. Regardless of the abovementioned, this measure can be complied with by the State if it opts to install a high school in the mentioned community.

xi) Policy that guarantees access to justice to indigenous women and that respects their cultural identity

271. The Commission asked that the Court order the State to design a policy that provides indigenous women with access to justice, and which respects their cultural identity.

272. In its final written arguments, the State submitted large amounts of information on the measures it had implemented to eradicate discriminatory practices against women in general, and indigenous women. The State made reference, among other programs, to the “strategy for monitoring the institutional actions and the organizational processes of the indigenous communities, entitled Intercultural Model [for] the Development of the Indigenous Peoples,” implemented by the Secretariat of Indigenous Affairs. This program includes as one of its central points the legal reform and the indigenous recognition, and its services are aimed at reviewing and systematizing laws to formulate a reform proposal and bill on rights and culture in said state. Moreover, the Intercultural Model includes a Defense and Legal Aid Program for Indigenous Peoples, whose actions are aimed at offering defense services, legal aid, and administrative procedures in favor of the indigenous population, in a manner “that overcomes the backwardness, inequality, and inequity with regard to the population.” The actions taken by this program are aimed at producing, with short and medium term results, full access of men and women to the jurisdiction of the State. In addition, Mexico also reported on the actions being taken by the Secretariat of Indigenous Affairs, in relation to access to justice, with a gender perspective for indigenous women victims of rape, such as economic support related to medications, hospitalization, medical studies, and transportation costs in emergency situations.

273. Moreover, Mexico reported on other initiatives such as the Training Program for indigenous women in collaboration with the Network of Indigenous Women of the state of Guerrero and six other indigenous women’s rights nongovernmental organizations and the Program for the promotion of justice related agreements, wherein projects have been carried out with civil organizations and the United Nations Fund for Women to promote leadership of indigenous women in public matters. Lastly, the State presented documentation regarding actions and programs on gender and indigenous related matters, among them the Program for institutional and social strengthening for the exercise of the human rights of indigenous women, created by the Government of the state of Guerrero, which promotes an “Intercultural Model and one of gender equity for the exercise of the human rights of indigenous women.”

274. The Court notes that the State provided certain information on programs and actions implemented in this sphere, whose existence and validity was not contested by the Commission, and regarding which the Commission did not provide any information indicating possible shortcomings. In this respect, the Court has already established that the obligation to motivate and establish a foundation for the Commission’s claims for reparations and costs, is not fulfilled by general requests without any legal or factual argument or evidence that would allow the Court to analyze their purpose, reasonableness, and scope. [FN261] This prevents the Court from ruling on the measure requested.

[FN261] Cf. Case of González et al., (“Cotton Field”), supra note 15, para. 493

xii) Office of the Public Prosecutor to provide attention to women victims of violence

275. The representatives asked the Court to order the Mexican State to create an Office of the Public Prosecutor, specialized to provide attention to women victims of violence in Ayutla de los

Libres, Guerrero. It should have appropriate technical and financial resources and personnel trained to handle cases such as this one who are conversant with the international standards for treating women victims of violence and torture.

276. Mexico indicated that there is a Special Prosecutor's Office for the Investigation of Sexual Offenses and Domestic Violence in the state of Guerrero, to which seven agencies specialized in sexual violence depend, located in each one of the regions that compose the state, and where female personnel attend to the agencies, as well as a Special Prosecutor's Office for Crimes of Violence against Women and Human Trafficking, adjoined to the Office of the Attorney General of the Republic. Additionally, during the public hearing in this case and in the final written arguments, the State indicated that the government of the state of Guerrero has taken numerous steps to provide attention to Guerrerense indigenous women through different entities, including the Secretariat for Women's Affairs and the Secretariat of Indigenous Affairs, such as the existence of twenty-five municipal units addressing violence against women. In addition, it reported that in order to offer more services that address psychological, legal, and social work, two mobile units were acquired to assist and prevent violence for the women of the Mountain and Costa Chica regions, that offer special attention to municipalities and towns that lack these types of services given that they are the areas with the highest level of marginalization and with a high level of indigenous peoples. Lastly, it reported that the Defense and Legal Aid Program for Indigenous Peoples, whose actions are aimed at offering defense and legal aid services and administrative procedures in favor of the indigenous population that include interpretation services and the provision of medications, hospitalization, and laboratory studies to women, victims of violence.

277. The Court assesses the information provided by the State and notes that the representatives have not commented on the various actions, mobile units, and institutions mentioned by Mexico, nor have they provided information on the possible problems with these. Based on the aforementioned, the Court does not have specific and sufficient information to assess the situation and order the creation of the office requested by the representatives. [FN262] Nevertheless, the services addressing women victims of violence must be provided by the institutions indicated by the State, among others, the Public Prosecutor's Office of Ayutla de los Libres, by means of the provision of material and personal resources, whose activities must be strengthened by the trainings ordered in the present Judgment.

[FN262] The expert Hernández Castillo noted that this measure of reparation, "is a request that does not directly satisfy the injured person, Inés Fernández Ortega", given her distrust of the State. On the other hand, she mentioned as a possible model, the State Program on Attention to Victims of Domestic and/or Sexual Violence that operates in Chilpancingo, Guerrero. Cf. Expert anthropological report of Mrs. Hernández Castillo presented at the public hearing (case file on the merits, tome V, folios 1672 and 1673).

278. Lastly, the Court observes that the report carried out by the Secretariat for Women's Affairs of the state of Guerrero provided by Mexico, identified, among other institutional impediments that prevent attention to violence in indigenous and rural areas, the concentration of

said services in cities, and the problems in access and transportation to the locations where those services are provided. [FN263] Said report recommended, among other measures, to decentralize the services and promote moving services of awareness and capacity building in detection and attention to problems of violence and to improve access to telephone services for the indigenous communities of Guerrero, so as to better address issues of violence against women. The Court understands that the first of these measures would be attended to by the mobile units. Nevertheless, the Court assesses said document and deems it useful to inform the State to assess the need to advance in the implementation of these two recommendations in the area where the facts of the present case took place.

[FN263] Cf. Network Development 2008, Secretariat for Women of the state of Guerrero and National Network of Shelters, *supra* note 55, folio 13320.

xiii) Other measures requested

279. In its final written arguments, the Commission requested the Court to order the State to comply with various additional measures of reparation, such as: i) to adopt, in a manner of high importance, a comprehensive and coordinated policy, supported by the appropriate resources, in order to guarantee that the cases of violence against women are adequately prevented, investigated, punished, and that the victims are repaired, and ii) to implement “public policies” and institutional programs aimed at surpassing the stereotypes regarding a woman’s role in society, and to promote the eradication of socio-cultural patterns of discrimination that prevent full access to justice for women, including training programs for public employees in all branches of the administration of justice and the police, and comprehensive prevention policies.” Moreover, the representatives, in their final written arguments, requested the Court to order the State to establish “appropriate and effective mechanisms for free, prior, and informed consent of the indigenous villages and communities of Guerrero when legislative or administrative measures are adopted that entail the presence of security forces, including soldiers, in the territories of said villages, or in those where said communities are settled.”

280. The Court notes that these requests were not presented at the opportune procedural moment by the Commission or the representatives, namely, in the respective application and brief of pleadings and motions. As such, this measure or reparation is time-barred and will not be considered by the Court.

C. Compensation, costs, and expenses

i) Pecuniary damage

281. The Court has developed in its jurisprudence the concept of pecuniary damage and the requisites for which it should be compensated. The Court has established that pecuniary damage supposes “the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the pecuniary consequences that bear a relationship to the facts of the case.” [FN264]

[FN264] *Bámaca Velásquez v. Guatemala. Reparations and Costs*, Judgment of February 22, 2002. Series C No. 91, para. 43; *Case of Chitay Nech*, supra note 18, para. 261, and *Case of Manuel Cepeda Vargas*, supra note 18, para. 242.

282. The Commission considered that the Court, in application of the criteria of equity that has always informed its decisions on reparations and in accordance with its jurisprudence, should establish the compensation that corresponds to the victims in the present case.

283. The representatives indicated that in 2009, a piece of land owned by Mrs. Fernández Ortega and her husband, where they grew agricultural products for their personal consumption and for sale “was damaged, presumably by soldiers as a form of intimidation owing to the report of the incident.” The “harm caused allegedly by soldiers to the parcel of land ruined the entire harvest of said year.” The representatives provided details of the plot and estimated the value of its annual production as approximately US\$5,500.00 (five thousand five hundred dollars of the United States of America). Accordingly, they asked the Court to establish, in equity, the appropriate sum to repair the damage caused.

284. The Court notes that the alleged loss of the harvest refers to facts that have not been examined in this Judgment, but rather to facts being examined in the procedure on provisional measures in the present case (supra paras. 212 and 213). In effect, this pertains to facts not yet proven in the present contentious case, and those of which the representatives refer to in a speculative manner, therefore it is not appropriate to grant a measure of reparation in this regard.

285. On the other hand, the representatives also stated that, as a direct result of the rape, owing to the stigmatization and discrimination suffered in her community and owing to the well-founded fear of suffering another attack from the soldiers, Mrs. Fernández Ortega isolated herself from her community and avoided leaving her home, “only doing so to advance her search for justice in her case.” Consequently, the victim ceased her activity of growing and selling agricultural products for approximately one year. Since the annual value of her harvests was alleged to be approximately US\$5,468.00 (five thousand four hundred and sixty-eight dollars of the United States of America) and that, there is no possibility of providing the Court with vouchers authenticating this sum, they asked the Court to establish, in equity, an amount to cover the loss of income.

286. The Court observes that the representatives did not present any documentation to authenticate the income earned by Mrs. Fernández Ortega. However, Given that both Mrs. Fernández Ortega and her husband work cultivating their land and both of them neglected their tasks owing to the facts of the case, [FN265] the Court decides to establish, in equity, the sum of US\$5,500.00 (five thousand five hundred dollars of the United States of America) or its equivalent in Mexican pesos, for Mrs. Fernández Ortega’s and Mr. Prisciliano Sierra’s loss of earnings. Each spouse should receive half this amount.

[FN265] Mrs. Fernández Ortega stated that in her search for justice, her and her husband “[n]eglected to properly care for the plot of land and the animals,” and that she no longer “went to work in the field because of fear of the [...] soldiers, and because of shame aswell,” adding that her husband also did not “go to work, and they did not plant or take care of [their] animals,” sworn statement of Mrs. Fernández Ortega before a public notary, *supra* note 62, folios 1486 and 1488. On his behalf, Mr. Prisciliano Sierra noted that “after the rape [his wife] stopped working on the plot of land for about one year” and that he “neglect[ed] the land and the animals,” sworn statement of Mr. Prisciliano Sierra before a public notary, *supra* note 66, folio 968. Lastly, the expert Correa González stated that “[t]he time and effort expended before the various governmental, state, and international institutions has cost [Mrs. Fernandez Ortega] and her husband economically, because they had to abandon their daily activities to dedicate themselves to the processing of the complaint,” psycho-social expert opinion by Mrs. Correa González, *supra* note 113, folio 1623.

287. On the other hand, the representatives indicated that Mr. Prisciliano Sierra, also ceased to work the land and, consequently, to receive an income during some periods in order to accompany his wife in her search for justice, as well as owing to fears of new acts of violence by the Army. Consequently, they asked the Court to establish, in equity, an amount for harm to the family assets.

288. The Court observes that the representatives did not submit documentation or any type of calculation to support neither the alleged harm to the family assets nor the earnings that Mr. Prisciliano Sierra failed to perceive; in addition, they did not specify the time during which he supposedly ceased to work the land. Furthermore, the Court notes that both Mrs. Fernández Ortega and Mr. Prisciliano Sierra stopped working on their land to seek justice in this case. Consequently, it can be supposed that the effects of the rape resulted in their inactivity at similar moments and for similar times. Notwithstanding the foregoing, the Court underscores that it awarded an amount, in equity, for the loss of earnings of Mrs. Fernández Ortega and Mr. Prisciliano Sierra (*supra* para. 286), based on the annual value of the harvest produced from their plot of land, which corresponds to the production of both spouses. Therefore, it does not find it pertinent to award another sum for the same reason.

ii) Non-pecuniary damage

289. The Court has developed in its jurisprudence the concept of non-pecuniary damage and the assumptions under which it must be compensated. The Court has established that the non-pecuniary damage consists of “the suffering and harm caused to the victim, directly, as well as to said victim’s relatives, the erosion of meaningful values to persons, as well as the alteration, of a non-pecuniary nature, to the living conditions of the victim and next of kin.” [FN266]

[FN266] The “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Chitay Nech et al., *supra* note 18, para. 273, and Case of Manuel Cepeda Vargas, *supra* note 18, para. 242.

290. The Commission asked the Court to establish in equity the amount of the compensation for non-pecuniary damage, based on the nature of the case and the gravity of the damage suffered by the victims.

291. The representatives indicated that the rape of Mrs. Fernández Ortega by the soldiers resulted in numerous repercussions on her life and her personal integrity that must be repaired. In this regard, they mentioned that Mrs. Fernandez Ortega: i) lives in a constant state of terror, as a consequence of the rape, with feelings of sadness, guilt, and shame; ii) feels defenseless and desperate because of the lack of justice, feelings which have been aggravated by the handling of the case in the military forum, and because she was exposed to the insensibility, indifference, and disrespect by the justice officials, and iii) has suffered the stigmatization and rejection by her community which have caused her feelings of defenselessness and frustration, among others. Accordingly, they asked that the Court orders the State to repair the damage caused to Mrs. Fernández Ortega owing to the distress resulting from her rape and the impunity, and that it establishes, in equity, a sum in this regard. Furthermore, they stated that Mrs. Fernández Ortega's family has also been subjected to serious harm as a result of what happened to the victim and of the lack of justice, particularly her daughter Noemí Prisciliano Fernández. Therefore, they asked that the Mexican State be ordered to repair the damage caused to Mrs. Fernández Ortega's family and that the Court decide, in equity, a financial reparation in this regard.

292. International jurisprudence has repeatedly established that the Judgment may constitute per se a form of reparation. [FN267] However, considering the circumstances of the case sub judice, the suffering that the violations committed caused the victims, as well as the alterations in their living conditions, and the other consequences of a non-pecuniary nature that they experienced, the Court finds it pertinent to establish a sum, in equity, as compensation for non-pecuniary damage. [FN268]

[FN267] Cf. Case of Neira Alegría et al. v. Perú. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 56; Case of Chitay Nech et al., supra note 18, para. 275, and Case of Manuel Cepeda Vargas, supra note 18, Operative Paragraph 7.

[FN268] Cf. Case of Neira Alegría et al., supra note 267, para. 56; Case of Radilla, supra note 33, para. 374, and Case of Chitay Nech et al., supra note 18, para. 275.

293. Based on the compensation ordered by the Court in other cases, and considering the circumstances of the present case, the nature and severity of the violations committed, the sufferings caused to the victims and the way they have been treated, the time that has elapsed since the rape, the denial of justice, and also the alterations in their living conditions and other consequences of a non-pecuniary nature that they suffered, the Court finds it pertinent to establish, in equity and accordingly to the different intensity of the damages, the sum of US\$ 50.000,00 (fifty thousand dollars of the United States of America) in favor of Mrs. Fernández Ortega, as compensation for non-pecuniary damage (supra paras. 131, 138, 159, 177, 183, 198, and 201). In addition, for the same concept, the Court establishes, in equity, compensation of US

\$10,000.00 (ten thousand dollars of the United States of America) in favor of each one of the eldest daughters, Noemí Prisciliano Fernández and Ana Luz Prisciliano Fernández (supra paras. 149 and 159), and US \$5,000.00 (five thousand dollars of the United States of America) in favor of each of the following people: Colosio Prisciliano Fernández, Nélida Prisciliano Fernández (supra paras. 149 and 159) and Neftalí Prisciliano Fernández (supra para 149). Lastly, the Court will fix compensation in equity at US \$2,500.00 (two thousand, five hundred dollars of the United States of America) in favor of Mr. Prisciliano Sierra (supra paras. 149 and 159).

iii) Costs and expenses

294. As the Court has indicated on previous occasions, costs and expenses are included within the concept of reparation embodied in Article 63(1) of the American Convention. [FN269]

[FN269] Cf. Case of Garrido and Baigorria, supra note 204, para. 79; Case of Chitay Nech et al., supra note 18, para. 279, and Case of Manuel Cepeda Vargas, supra note 18, para. 254.

295. The Inter-American Commission asked that the Court “order the State [...] to pay the reasonable and necessary costs and expenses arising from the processing of the present case that have been duly authenticated.”

296. In their final written brief of pleadings and motions, the representatives asked that the Court to order the State to pay the following amounts for costs and expenses: i) the sum that the Court establishes “in equity in favor of the victims [...] for the expenditure incurred” in their seek for justice; ii) in favor of CEJIL, US\$10,182.65 (ten thousand one hundred and eighty-two dollars of the United States of America and sixty-five cents) for the expenses incurred from June 2007 up until the presentation of the application and US\$16,225.27 (sixteen thousand two hundred and twenty-five Dollars of the United States of America and twenty-seven cents) for the expenses incurred following the presentation of the application, and iii) in favor of “Tlachinollan,” US\$6,296.93 (six thousand two hundred and ninety-six Dollars of the United States of America and ninety-three cents) for the expenses incurred from March 2002 until the presentation of the application and US\$17,847.38 (seventeen thousand eight hundred and forty-seven dollars of the United States of America and thirty-eight cents) for the expenses incurred following the presentation of the application. In addition, in their final written arguments, the representatives indicated that “Tlachinollan” had also disbursed the sum of US\$1,843.61 (one thousand eight hundred and forty-three dollars of the United States of America and sixty-one cents), supposedly for expenses prior to the presentation of the application, which they alleged were not attached to their brief on pleadings and motions involuntarily, owed to “involuntary error.” Lastly, the representatives indicated that both CEJIL and “Tlachinollan” had incurred expenses for, inter alia, photocopies, stationery, and telephone calls for US\$250.00 (two hundred and fifty dollars of the United States of America) each, and also requested that the Court establish an amount for any future expenditure relating to the processing of the case.

297. Regarding reimbursement of costs and expenses, the Court must prudently assess their scope. They include the expenses incurred before the authorities of the domestic jurisdiction, as

well as those incurred during the proceedings before the Inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that the quantum is reasonable. [FN270]

[FN270] Cf. Case of Garrido and Baigorria, *supra* note 204, para. 82; Case of Chitay Nech et al., *supra* note 18, para. 285, and Case of Manuel Cepeda Vargas, *supra* note 18, para. 258.

298. The Court has indicated that “the claims of the victims or their representatives concerning costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural occasion granted to them, namely, in the brief of pleadings and motions; notwithstanding the possibility that these claims may be updated subsequently, in keeping with the new costs and expenses that may have been incurred as a result of the proceedings before this Court.” [FN271] Furthermore, the Court reiterates that it is not sufficient that the parties merely submit probative documents; rather they are required to submit arguments that connect the evidence to the fact that it is supposed to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly explained.” [FN272] With their final arguments, the representatives included additional expenses presumably incurred by Tlachinollan prior to the presentation of the application that were not included in the brief on pleadings and motions. However, the representatives indicated that this omission was an “involuntary error.” Also in their final written arguments, the representatives included other expenses that one of said organizations had incurred in 2009, prior to the presentation of the brief of pleadings and motions that were not indicated at the appropriate time. Due to the time-barred presentation, the Court will not consider said expenses when determining the quantity set for costs and expenses. Lastly, the Court notes that a large number of expenses noted by the representatives are not accompanied by appropriate documentation, or that from the receipts, there is not a clear nexus regarding the relation to the present case.

[FN271] Cf. Case of Chaparro Álvarez and Lapo Ñíguez. v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, para. 275; Case of the Dos Erres Massacre, *supra* note 20, para. 302, and Case of Chitay Nech et al., *supra* note 18, para. 284.

[FN272] Cf. Case of Chaparro Álvarez and Lapo Ñíguez, *supra* note 271, para. 277; Case of the Dos Erres Massacre, *supra* note 20, para. 301, and Case of Chitay Nech et al., *supra* note 18, para. 284.

299. Notwithstanding the aforementioned, the Court determines that the representatives incurred various expenses before the Court in relation to fees, evidence collection, transportation costs, communication services, among others, in the processing at the domestic and international forums of the present case. Taking into account the abovementioned, the Court determines, in equity, that the State must provide the amount of US\$ 14,000.00 (fourteen thousand dollars of

the United States of America), US\$ 10,000.00 (ten thousand dollars of the United States of America), and y US\$ 1,000.00 (one thousand dollars of the United States of America) in favor of CEJIL, of Tlachinollan, and of Mrs. Fernández Ortega, respectively, for costs and expenses incurred. In the monitoring of compliance procedures of the present Judgment, the Court may provide the reimbursement on behalf of the State to the victims or their representatives for reasonable expenses that have been duly proven.

iv) Method of compliance with the ordered payments

300. The State must pay the compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses established in this Judgment directly to those indicated herein, within one year of notification of the Judgment, under the terms of the following paragraphs.

301. In regard to the compensation ordered in favor of Noemí Prisciliano Fernández and Ana Luz Prisciliano Fernández, Colosio Prisciliano Fernández, Nérida Prisciliano Fernández, and Neftalí Prisciliano Fernández, the State must deposit it in a solvent Mexican institution. The investment must be made within one year, in the most favorable financial conditions permitted by the law and banking practices, while the beneficiaries are minors of age. Said sums can be withdrawn by each of them when they are no longer minors of age, or where necessary, before then if it is in the best interest of the child, to be determined by the competent judicial authorities. If the compensation is not claimed within ten years of the minor coming of age, the sum shall be returned to the State with the accrued interest.

302. In regard to the payment of the amount that corresponds to Mrs. Fernández Ortega, the State must analyze the convenience, if the victim agrees, to carry out payment via a deposit made in a bank account, without this affecting the amount ordered in the Judgment.

303. Should any of the beneficiaries die before they have received the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic laws.

304. The State must comply with its pecuniary obligations by payment in Dollars of the United States of America or the equivalent amount in Mexican pesos, using the exchange rate in force in the New York exchange the day before the payment to make the respective calculation.

305. If, for reasons that can be attributed to the beneficiaries of the compensation or to their heirs, it is not possible to pay the amounts established within the time indicated, the State shall deposit the amount in their favor in an account or a deposit certificate in a solvent Mexican financial institute in dollars of the United States of America and in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the compensation has not been claimed, the amounts shall revert to the State with the accrued interest.

306. The amounts allocated in this Judgment as compensation and for reimbursement of costs and expenses must be delivered to the persons indicated integrally, as established in this Judgment, without any deduction arising from possible taxes or charges.

307. If the State should fall into arrears, it shall pay interest on the amount owed, corresponding to the banking interest on arrears in Mexico.

XII. OPERATIVE PARAGRAPHS

308. Therefore,

THE COURT

DECIDES,

unanimously, that

1. It admits the withdrawal of the preliminary exceptions filed by the State, in the terms of paragraph 13 of the present Judgment.
2. It accepts the partial acknowledgment of the State, in the terms established in paragraphs 16 to 26 of the present Judgment.

DECLARES,

unanimously, that:

3. The State is responsible for the violations of the rights to personal integrity, dignity, and private life, enshrined, respectively, in Articles 5(1), 5(2), 11(1), and 11(2) of the American Convention on Human Rights, in relation to Article 1(1) of the same, and Articles 1, 2, and 6 of the Inter-American Convention to Prevent and Punish Torture, as well as for the noncompliance of the obligation established in Article 7(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women to the detriment of Mrs. Fernandez Ortega, in accordance with that mentioned in paragraphs 100 to 131 and 136 to 138 of this Judgment.
4. The State is responsible for the violation of the right to personal integrity, enshrined in Article 5(1) of the American Convention on Human Rights, in relation with Article 1(1) of the same, to the detriment of Mr. Prisciliano Sierra and Noemí, Ana Luz, Colosio, Nelida, and Neftalí, all with the surname of Prisciliano Fernández, in accordance with that mentioned in paragraphs 143 to 149 of this Judgment.
5. The Court does not have the evidence to establish the existence of a violation of the right to personal integrity to the detriment of Mrs. María Lidia Ortega, and Messrs. Lorenzo and Ocotlán Fernández Ortega, in conformity with that mentioned in paragraphs 151 to 154 of this Judgment.
6. The State is responsible for the violation to right of not being the object of arbitrary or abusive interference with private life, enshrined in Article 11(2) of the American Convention on Human Rights, in relation with Article 1(1) of the same, to the detriment of Mrs. Fernández Ortega, Mr. Prisciliano Sierra and Noemí, Ana Luz, Colosio, Nelida, and Neftalí, all with the surname Prisciliano Fernández, pursuant to that mentioned in paragraphs 157 to 159 of this Judgment.

7. The State is responsible for the violation of the right to judicial guarantees and judicial protection, recognized in Article 8(1) and 25(1) of the American Convention, to the detriment of Mrs. Fernández Ortega: a) in relation to Articles 1(1) and 2 of the same, pursuant to that mentioned in paragraphs 175 to 183 of the present Judgment, and b) in relation to Article 1(1) of the American Convention and did not comply with the obligation established in Article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, in conformity with that mentioned in paragraphs 190 to 198 of the present Judgment. Likewise, Mexico did not comply with the obligation to guarantee, without discrimination, access to justice, established in Articles 8(1) and 25 of the American Convention on Human Rights in relation to Article 1(1) of the same instrument, to the detriment of Mrs. Fernández Ortega, pursuant to paragraphs 199 to 201 of the present Judgment.

8. The State is not responsible for the noncompliance with Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture to the detriment of Mrs. Fernández Ortega, pursuant to paragraph 202 of this Judgment.

9. It does not befall on the Court to make a declaration on the alleged violation of Article 16 of the American Convention on Human Rights, in the terms of paragraphs 218 and 219 of the present Judgment.

AND ORDERS,

unanimously, that:

10. This Judgment constitutes per se a form of reparation.

11. The State must effectively conduct in the common jurisdiction, with due diligence and within a reasonable period of time, the criminal investigation, and where needed, the criminal proceedings to determine those criminally responsible and to effectively apply the punishment and consequences that the law dictates, in the period of time established in paragraphs 228 to 230 of this Judgment.

12. The State must, in accordance with the relevant normative principles, examine the facts and conduct of the agent of the Public Prosecutor's Office that obstructed the reception of the complaint presented by Mrs. Fernandez Ortega, pursuant to paragraph 231 of this Judgment.

13. The State must adopt, in a reasonable period of time, the relevant legislative reforms to conform Article 57 of the Military Code of Justice with international standards on the matter and the American Convention on Human Rights, pursuant to that established in paragraph 239 of this Judgment.

14. The State must adopt the relevant reforms so as to permit that individuals affected by the intervention of the military justice system have an effective remedy to contest its jurisdiction, in conformity with that established in paragraph 240 of this Judgment.

15. The State must carry out a public act of acknowledgment of its international responsibility in regard to the facts of the present case, in the terms of paragraph 244 of the present Judgment.

16. The State must carry out the aforementioned publications, pursuant to that established in paragraph 247 of the present Judgment.

17. The State must provide the medical and psychological treatment as required by the victims, in the terms of paragraphs 251 and 252 of the present Judgment.

18. The State must continue with the process of standardization of an action protocol, for the federal forum and that of the state of Guerrero, regarding the attention provided and investigation of rape, taking into consideration, to the extent relevant, the parameters established in the Istanbul Protocol and the Orders of the World Health Organization, in accordance with paragraph 256 of this Judgment.

19. The State must continue to implement programs and permanent trainings regarding diligent investigation in cases of violence against women, that include an ethnic and gender based perspective, which should be administered to federal employees and those of the state of Guerrero, in conformity with that established in paragraphs 259 and 260 of this Judgment.

20. The State must implement, in a reasonable period, a permanent and obligatory training and formation program or course in human rights, directed at the members of the Armed Forces, pursuant to that established in paragraph 262 of the present Judgment. 21. The State must grant scholarships for study at public Mexican institutions for the benefit of Noemí, Ana Luz, Colosio, Nelida, and Neftalí, all with the surname of Prisciliano Fernández, in conformity with that established in paragraph 264 of this Judgment.

22. The State must facilitative the necessary resources so that the indigenous Me'paa community may establish a community center, to be considered a Women's Center, where educational activities regarding human rights and the rights of women can be carried out, pursuant to paragraph 267 of the present Judgment.

23. The State must adopt measures so that the girls of the community of Barranca Tecoani that carry out their middle school studies in the city of Ayutla de los Libres, may provide facilities that offer adequate food and shelter, so as to allow the girls to continue their education at the institutions which they attend. Notwithstanding the aforementioned, this measure may be complied with by the State if it decides to install a middle school in the mentioned community, in the terms established in paragraphs 270 of this Judgment.

24. The State must assure that the attention services for women victims of sexual violence are offered by institutions indicated by Mexico, among others, the Public Prosecutor of Ayutla de los Libres, via the provision of medical resources and personnel, whose activities must be strengthened with trainings, in conformity with that established in paragraph 277 of the present Judgment.

25. The State must pay the quantities fixed in paragraphs 286, 293, and 299 of the present Judgment, for pecuniary and non-pecuniary damage, and the reimbursement of costs and expenses, as it so corresponds, within a period of one year, to begin as of the notification of the present Judgment, in the terms of paragraphs 300 to 307 of the same.

26. The Court will monitor the full compliance with this Judgment, in the exercise of its attributions and in compliance with its obligations pursuant to the American Convention on Human Rights, and will conclude the present case once the State has entirely satisfied said dispositions. In a period of six months as of the notification of this Judgment, the State must offer the Court a brief regarding the measures adopted to satisfy compliance.

The Judge Alejandro Carlos Espinosa rendered a concurring opinion, which accompanies this Judgment.

Written in Spanish and in English, the Spanish text being authentic, in San Jose, Costa Rica on August 30, 2010.

Diego García-Sayán
President

Leonardo A. Franco
Manuel Ventura Robles
Margarette May Macaulay
Rhadys Abreu Blondet
Alberto Pérez Pérez
Eduardo Vio Grossi

Alejandro Carlos Espinosa
Judge Ad Hoc

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE AD HOC ALEJANDRO CARLOS ESPINOSA IN
RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN
RIGHTS IN THE CASE OF FERNÁNDEZ ORTEGA ET AL. V. MEXICO, OF AUGUST 30,
2010

1. The present concurring vote is for the cited case *ut supra* as well as for the case of *Rosendo Cantú et al. v. Mexico* in consideration of the following reasons:

- a) It deals with soldiers in service, namely agents of the State of Mexico, that under special conditions committed grave violations of the domestic and international legal codes, which should have been observed in attention given their role as guarantors of the domestic legal system of the State of Mexico and regarding the rights of their co-nationals;
- b) The passive subject [victim] of the crime of rape for whom this case has unfolded, is a woman, poor, and indigenous, exposed to a high level of vulnerability; apart from not speaking the Spanish language;
- c) The Code of Military Justice is similarly applied to investigate crimes committed by soldiers and those in which civilian victims are found, in attention to the provisions of Article 57, section II, subsection a) of the mentioned legal code; that which was ordered modified in the case of *Radilla Pacheco v. México*;
- d) The unfavorable circumstances for the victims in regard to geo-referencing elements, access to justice, and health, as well as high vulnerability are similar;

- e) The delay was extreme in the preliminary investigation of the criminal procedure, and timely results by the various instances available in the search for justice were not produced, and
- f) The victims underwent torturous paths to obtain access to justice.

2. In this concurring opinion, I express my agreement with the logic of motivation and argumentation, and therefore, with the content of the Judgment, given the case analysis by the Inter-American Court of Human Rights that provoked the ruling in the case of *Fernández Ortega et al. v. México*, as well as with the criteria and sums for reparation of harm detailed in the Judgment, due to their nature and proportionality. I add in this statement, and in addition to the findings held in the Judgment, my reasoning *ad cautelam* derived from specifics that I find the State of Mexico should observe.

3. As indicated by the American Convention on Human Rights, the subsidiary nature of the Inter-American jurisdiction of human rights, in contrast to the domestic jurisdiction, is fundamental, given that it enhances and compliments that provided in the domestic laws of the American States; as such, I consider that the appropriate interpretation of Article 13 of the Constitution of the United Mexican States should harmonize not only Article 57, section II, subsection a) of the Code of Military Justice, but also the provisions enshrined in subsections b), c), d), and e), of the indicated normative instrument.

4. Despite the structural and normative weaknesses presented in the Code of Military Justice, which dates back to 1933, it should be noted that the State of Mexico was willing to investigate the case institutionally, but it is also evident that it did not go beyond carrying out routine procedures knowing that the facts would not be ascertained nor responsibility be pinned on the State agents, without seeking the maximum in the quest for justice “in that as time passes the truth passes.”

5. The State of Mexico should ensure that legal uncertainty no longer occurs, that which affects governed individuals when crimes are investigated of one and of another application of the law within the constitutional jurisdiction, namely, that investigative procedures be undertaken without a definite juridical criteria derived from a factual relation, such as when soldiers are criminally charged, then it becomes less coherent when an investigations is then carried out in the common jurisdiction, leaving the victims defenseless because of the lack of a legal remedies to strengthen their defense and to guarantee access to justice for them.

6. It must be noted, that however negligence and lack of results in procuring justice from the Mexican State were duly proven within the different criminal constitutional jurisdictions that were involved in the investigation of the facts, even with those acting as assistant to the public prosecutor, it shall also be said, that this is not a systematic violation used by the Mexican State as an instrument to intentionally frighten the indigenous communities in the region, particularly in regards to women.

7. The application, setting the litigious framework of the proceeding, does not exclude the possibility of presenting supervening evidence before a judgment is pronounced, those of which must be distinguished, in a timely matter, from the facts that are not grounds of the *litis*, even if

they are related to the case, therefore the complaint, or the initial written document, sets the beginning of the litis.

8. The attention given by the Mexican State to the Judgment, shall not only emphasize the State's obligation to provide first level psychological care to the victim, namely, care given by experts on the field to all direct and indirect victims, but it also shall supervise that such treatments are indeed carried out until the victims are medically discharged.

9. Resulting from retrospective and prospective studies, the Mexican State must redesign and strengthen public policies that involve its Armed Forces in order to minimize interaction between military soldiers and the civil population, thereby ensuring not only a decrease in inconveniences caused, but also a decrease in violations to fundamental rights for greater offenses to the civil population, while disciplinary forces carry out their tasks and that have been emphasized due to public safety issues in Mexico; consequently, indoctrination should be given to military soldiers who provisionally carry out tasks of public safety or tasks which are linked to it or to the investigation and persecution of the crimes in which they participate.

10. With the current paradigmatic case, the Mexican State should seize the opportunity, not only to restore its commitment to civil society, but also to simultaneously, execute proper compliance to the Judgment handed down in this case, as well as in the case of Rosendo Cantu et. al.; it is now time to start a review and transformation of a lagging military model of justice, not only pertaining to the legislative methodology, but also to the distribution of its courts and tribunals and its substantive and procedural rules, thus considering adopting a new model which will not play down the importance of service, obedience, and discipline, but yet will allow for the transformation of the Mexican military judicial system.

11. With ad cautelam, the importance and significance for the State of Mexico of, in a preventive sense, taking its military tribunals to the Judicial branch of the Federation, should be considered because if it is true that irregularities were involved in the criminal proceedings of the preliminary investigation of this case, it is likely that subsequent cases face, in addition, the burden of yet another element that conflicts with international standards, which under said fact would be the concurrence of two powers of the State in one and the rupture of the unity of the trial process.

Alejandro Carlos Espinosa
Judge Ad hoc

Pablo Saavedra Alessandri
Secretary