

**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF FERNÁNDEZ ORTEGA *ET AL.* v. MEXICO**

**JUDGMENT OF MAY 15, 2011**

*(Interpretation of judgment on preliminary objection,  
merits, reparations and costs)*

In the case of Fernández Ortega *et al.*

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Diego García-Sayán, President  
Leonardo A. Franco, Judge  
Manuel E. Ventura-Robles, Judge  
Margarette May Macaulay, Judge  
Rhadys Abreu Blondet, Judge  
Alberto Pérez Pérez, Judge  
Eduardo Vio Grossi, Judge, and  
Alejandro Carlos Espinosa, Judge *ad hoc*

also present,

Pablo Saavedra Alessandri, Secretary,<sup>1</sup>

pursuant to Article 67 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Article 68 of the Rules of Procedure of the Court<sup>2</sup> (hereinafter “the Rules of Procedure”) decides on the request for interpretation of the judgment on preliminary objection, merits, reparations and costs in this case delivered by the Court on August 30, 2010 (hereinafter “the judgment”), submitted by the United Mexican States (hereinafter also “the State” or “Mexico”) on December 29, 2010.

**I**  
**INTRODUCTION OF THE REQUEST FOR INTERPRETATION  
AND PROCEEDING BEFORE THE COURT**

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<sup>1</sup> For reasons beyond her control, the Deputy Secretary Emilia Segares Rodríguez was not present for the deliberation of this judgment.

<sup>2</sup> Rules of Procedures approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

1. On August 30, 2010, the Court handed down the judgment, and the parties were notified on October 1 that year.
2. On December 29, 2010, the State submitted a request for interpretation under Articles 67 of the Convention and 68 of the Rules of Procedure. Mexico asked the Court to clarify the meaning and scope of:
  - a) “Paragraph 103 [of the judgment], directly related to paragraphs 115, 116 and 117 thereof, in order to clarify whether the indication determining the participation of soldiers in the acts perpetrated against Mrs. Fernández Ortega [constitutes] prejudgment of those allegedly responsible, as regards their number and specific status as military personnel,”<sup>3</sup> and
  - b) “Paragraph 177 of the judgment and, if appropriate, clarify whether its interpretation of the involvement of the military jurisdiction in the investigation

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<sup>3</sup> The paragraphs mentioned by the State indicate:

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, 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.

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, who performed a physical and gynecological examination from which she determined that “there was no evidence of violence.” 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. In this case, it is established that the act was committed by three armed soldiers in a situation of extreme coercion, aggravated by the fact that it occurred in a context of a relationship of authority.

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 its own errors or shortcomings, by destroying evidence that was in its 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. Based on the above, the Court finds it proven that Mrs. Fernández Ortega was the victim of rape, committed by a soldier in the presence of two other soldiers who observed the perpetration of the rape, while she was in her own home.

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.

into the facts constitutes prejudgment with regard to those probably responsible for the violations indicated in that paragraph.”<sup>4</sup>

3. On January 12, 2011, under the provisions of Article 68(2) of the Rules of Procedure and on the instructions of the President of the Court, the Secretariat of the Court (hereinafter also “the Secretariat”) sent a copy of the request for interpretation to the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission” or “the Commission”) and to the *Organización del Pueblo Indígena Tlapaneco/Me’phaa (OPIM)* [Tlapaneco/Me’phaa Indigenous Peoples Organization], the *Centro de Derechos Humanos de la Montaña “Tlachinollan”* [Tlachinollan” Mountain Human Rights Center] and the Center for Justice and International Law (CEJIL) (all hereinafter “the representatives”) giving them until February 11, 2011, to submit any written arguments they considered pertinent.

4. On February 11, 2011, the Inter-American Commission submitted its written arguments on the request for interpretation, and considered “the State’s assertions and conclusions inadmissible and irreceivable,” because the State was not asking the Court to interpret the meaning or scope of the ruling, but rather it was seeking a revision and reconsideration of the final and non-appealable judgment because it disagreed with the decisions therein. The Commission also indicated that the State had the opportunity to litigate the issues on which it had requested interpretation at the appropriate procedural moment, and that there were no grounds for reopening the discussion.

5. On February 11, 2011, the representatives forwarded their written arguments and asked the Court to declare the request for interpretation inadmissible. They argued that: (a) the State was attempting to modify the Court’s judgment by asking it to address factual and legal issues that had been brought up during the analysis of the merits of the case and specifically decided in the judgment, and (b) there was no reasonable doubt with

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<sup>4</sup> The paragraph mentioned by the State establishes:

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 it has in previous cases [...], 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.

regard to the meaning and scope of the aspects about which the interpretation was requested. In addition, they considered that the State was trivializing the proven facts and, consequently, weakening the operative paragraphs of the judgment, resulting in a lack of compliance with them.

## **II COMPETENCE AND COMPOSITION OF THE COURT**

6. Article 67 of the Convention establishes that:

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

7. Pursuant to this article, the Court has competence to interpret its judgments. In order to examine the request for interpretation and to rule on it, in accordance with Article 68(3) of the Rules of Procedure, the Court must, if possible, have the same composition as when it handed down the judgment in question. On this occasion, the Court is composed of the same judges who adopted the judgment the interpretation of which has been requested by the State.

## **III ADMISSIBILITY**

8. The Court must verify whether the request for interpretation meets the requirements established in the applicable norms, namely Article 67 of the Convention, cited above, and Article 68 of the Rules of Procedure, the relevant part of which states:

1. The request for interpretation referred to in Article 67 of the Convention may be made in connection with judgments on preliminary objections, on the merits, or on reparations and costs, and shall be filed with the Secretariat. It shall state with precision questions relating to the meaning or scope of the judgment of which interpretation is requested.

[...]

4. A request for interpretation shall not suspend the effect of the judgment.

5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

9. In addition, Article 31(3) of the Rules of Procedure establishes that “judgments and orders of the Court may not be contested in any way.”

10. The Court observes that the State presented its request for interpretation of the judgment within the 90-day period established in Article 67 of the Convention, because the request was submitted on December 29, 2010, and the parties were notified of the judgment on October 1, 2010.

11. As this Court has ruled previously and in its consistent case law, clearly supported by the applicable norms, a request for interpretation of judgment must not be used as a means of challenging the judgment whose interpretation is requested. The exclusive purpose of the request is to clarify the meaning of a ruling when one of the parties argues that the text of its operative paragraphs or of its considerations lacks clarity or precision, provided that those considerations have a bearing on those operative paragraphs.<sup>5</sup> Therefore, the modification or annulment of the judgment in question cannot be sought through a request for interpretation.<sup>6</sup>

12. Furthermore, the Court has established that a request for interpretation of judgment cannot address factual and legal issues that were already raised at the proper procedural moment and on which the Court has made a ruling.<sup>7</sup>

13. The Court will proceed to analyze the request for interpretation presented by the State and, if appropriate, make the pertinent clarifications. To do so, it will examine the points raised by Mexico, as well as the arguments of the Inter-American Commission and the representatives.

#### *Arguments of the parties*

14. The Mexican State declared its willingness to comply with all aspects of the Court's judgment in strict observance of its international commitments. It affirmed that compliance with the judgment "constitutes an element of public order that the Mexican authorities are obliged to observe, arising from the obligations assumed [...] before the inter-American system for the protection of human rights," and it reiterated "that it will continue to promote all necessary measures to comply with its international obligations in

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<sup>5</sup> Cf. *Case of Loayza Tamayo v. Peru*. Interpretation of judgment on the merits. Order of the Inter-American Court of Human Rights of March 8, 1998. Series C No. 47, para. 16; *Case of Escher et al v. Brazil*. Interpretation of the judgment on the preliminary objections, merits, reparations and costs. Judgment of the Inter-American Court of Human Rights of November 20, 2009. Series C No. 200, para. 11; and *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*. Interpretation of the judgment on preliminary objections, merits, reparations and costs. Judgment of the Inter-American Court of Human Rights of November 24, 2009. Series C No. 198, para. 11.

<sup>6</sup> Cf. *Case of Loayza Tamayo v. Peru*. Interpretation of the judgment on merits, *supra* note 5, para. 16; *Case of Valle Jaramillo et al. v. Colombia*. Interpretation of the judgment on merits, reparations and costs. Judgment of the Inter-American Court of Human Rights of July 7, 2009, para. 8, and *Case of Escher et al. v. Brazil*, *supra* note 5, para. 11.

<sup>7</sup> Cf. *Case of Loayza Tamayo v. Peru*. Interpretation of the judgment on reparations and costs. Judgment of the Inter-American Court of Human Rights of July 3, 1999. Series C No. 53, para. 15; *Case of the Miguel Castro Castro Prison v. Peru*. Interpretation of the judgment on merits, reparations and costs. Judgment of the Inter-American Court of Human Rights of August 2, 2008. Series C No. 181, para. 26, and *Case of Escher et al. v. Brazil*, *supra* note 5, para. 12.

light of the judgment.” Mexico based its request for interpretation on six arguments that are summarized below.

15. First, it noted that paragraph 103 of the judgment indicates that the Court does not have competence to determine individual responsibilities, despite which, in paragraph 177, in relation to paragraphs 115 and 116, it refers to military personnel as participants in the perpetration of the offenses denounced by Mrs. Fernández Ortega. In this regard, the State indicated that this “should be clarified, since it individualizes the number of persons who intervened and specifically indicates that they were soldiers.” The Court “identif[ied] three individuals who are part of a [military] institution as those responsible [for raping Mrs. Fernández Ortega],” a determination that, according to the State, “does not fall within the Court’s competence, [because] it is not incumbent on the Court to establish specific or individual criminal responsibility.” It also indicated that it is essential to consider that “in the domestic sphere, [...] the case is still at the preliminary investigation stage, so that the determination of criminal responsibilities for the alleged offenses perpetrated against [Mrs.] Fernández Ortega will be derived from these investigations, including whether or not State agents were involved in the facts.” Consequently, it concluded that “as the investigation is ongoing [...] direct criminal responsibility cannot be attributed to three State agents and, in particular, their status as soldiers or any other characteristics, such as the institution to which they belong, individualized or specified.”

16. Second, the State affirmed that the judgment “is not compatible with the criteria [of the Court] consisting in not attributing individual responsibilities since, on the one hand, [...] it asserts that three military personnel participated in the rape [...] and, on the other, it states that individualizing those responsible is not one of Court’s competences.” Hence, in its case law, the Court “has abstained [...] from attributing individual responsibilities or making direct accusations.” The State reproduced several quotes by the Court in different cases where it had indicated that it was not a criminal court that analyzed individual criminal responsibility.

17. Third, Mexico stated that the corresponding criminal responsibility has not yet been legally determined, because criminal proceedings were still ongoing. These are the domestic criminal proceedings “that [will] permit identifying [those responsible] and thus establish whether they are agents of the State and the institution to which they belong.” It reiterated that “independent of whether or not those responsible belong to a specific institution, the investigations will be carried out under the ordinary system of justice, as the Court ordered.”

18. Fourth, the State argued that “the ruling made [by the Court] in its judgment that it was military personnel who perpetrated the rape [...] appears to run contrary to the American Convention itself [...] and even to the guarantees established in the Constitution of the United Mexican States.” In this regard, in order to attribute direct responsibility to military personnel, the authorities must follow a procedure that permits duly attributing participation in the facts and, if appropriate, the guilt of the State agents. Proceeding in any other way could violate articles 14, 16 and 20 of the Constitution, as

well as Articles 8, 24, and 25 of the Convention owing to failure to provide adequate judicial guarantees and protection, especially regarding the presumption of innocence. The State highlighted that “all the stages of the investigation in this case will be carried out exhaustively in order to elucidate the facts and thereby safeguard the constitutional rights of the accused,” and it indicated that “if the authorities do not respect these principles, which are also in keeping with the standards set by [the] Court, they would be violating the provisions of Mexican law and the guarantees established in the [...] Convention.”

19. Fifth, Mexico reiterated the need for the Court to “clarify the meaning of paragraph 103 of the judgment in relation to paragraphs 115, 116 and 117.” In this regard, it pointed out that, having established in paragraph 103 that it was not incumbent on the Court to establish individual responsibility, the Court then “refers to the perpetration of rape against Mrs. [...] Fernández Ortega.” According to the State, “the Court proceeded to evaluate the facts within its specific contentious jurisdiction in the area of human rights, as revealed in paragraph 117[.] This matter becomes important because, in paragraph 194, [...] the Court itself emphasized [...] the guiding principles that should be observed in criminal investigations into human rights violations. According to the provision that domestic legislation must be adapted to the Convention, it is important that the Court take into consideration that, once each of [those] principles has been complied with [...] in the investigations into the rape allegedly committed by soldiers, [...] it will not depend solely and exclusively on the Public Prosecution Service to determine whether or not a crime has been committed, [...] but rather on the ruling that, if appropriate, is issued by the competent judicial authority.” Consequently, the judgment should not “be interpreted as an order or instruction that necessarily leads to the criminal prosecution of three soldiers [or] to imposing punishment on the three individuals referred to in the judgment because, in addition to the fact that the Court cannot individualize responsibilities, it did not order these measures.” The State therefore requested that “the scope of paragraph 103 of the judgment in relation to paragraphs 115, 116 and 117 be clarified, both because [the] Court did not establish individual criminal responsibilities (because it confined its ruling to its contentious jurisdiction) and because, in the eleventh operative paragraph, it ordered that the investigations be conducted and, as appropriate, criminal proceedings be filed against those found responsible so that the competent judicial authority could rule on the existence of criminal responsibilities and, if appropriate, impose the legal punishments and consequences.” The State concluded that the judgment “is unclear” and therefore requested clarification of whether “it should be understood in the sense that the investigations and the criminal prosecution must have the specific sole and unequivocal result of punishing three soldiers.”

20. Finally, sixth, the State affirmed that it is “concerned [...] that the Court’s decision entails a violation of the principle of the presumption of innocence established in Article 8(2) of the Convention, [...] given that paragraph 103 in relation to paragraphs 115, 116, and 117 suggests that, based on the judgment, the domestic public prosecution and judicial authorities must necessarily seek out and punish three guilty parties.”

21. The Inter-American Commission recalled that, for an international court, the standards for appraising evidence are less formal than under domestic legal systems and that in its proceedings, the Inter-American Court can find indications of the participation of agents that entail the State's responsibility. It considered that the State had the opportunity to litigate the issues raised in its request for interpretation at the appropriate procedural moment and that there was no basis for reopening the discussion on matters that the Court had already decided. It added that the State's arguments contradict the basic principles of the international responsibility of States, and are "contrary to what the Court established in its judgment and represent a disregard for what the Court established as well as a threat to the binding nature of the rulings of the Inter-American Court and its authority." Finally, the Commission noted that a fundamental aspect to be considered in this case in order to establish the international responsibility of the State was whether members of the army participated, without individualizing them or punishing their conduct. Based on the foregoing, the Commission reiterated that the State's request was unnecessary and inadmissible and did not meet the legal requirements to be considered a request for interpretation.

22. The representatives affirmed that the State's arguments reveal the State's disagreement with the Court's decision and its wish that it be modified, even though its meaning and scope are clear. First, the State seeks to question facts that have been proven by the Court and, to this end repeats arguments that it had already submitted "and ingeniously indicates an alleged undue interference by the Court in the sphere of domestic criminal justice." Regarding the latter, the representatives indicated that, during the proceedings before the Court, the State argued the absence of evidence that could confirm the participation of State agents in the rape of the victim, and the Court expressly decided this matter in the judgment. The representatives also affirmed that the State "questions the Court's competence to consider these facts proven" even when "it is evident [...] that [the Court] attributes the conduct that violated human rights to a specific public authority, which is what enables the Court to attribute it to the State." In this regard, if the Court "did not have the power to establish the facts of the case, including that the authors of a human rights violation belonged to a State entity, it could not perform its functions." The representatives highlighted that, as noted in the judgment, the evidence produced during the proceedings was sufficient for the Court to find State responsibility, and that the State did not provide any evidence in the proceedings before the Court that would contradict that Mrs. Fernández Ortega was raped.

23. The representatives added that the State's allegation that the Court had interfered in the sphere of the domestic criminal justice system should be dismissed, because "establishing how the facts occurred does not imply attributing individual criminal responsibilities." The Court "did not make any assertions [...] concerning aspects such as the guilt of certain identified individuals, the punishment to be applied, the existence of aggravating factors, the identification of masterminds or the concurrence of offenses, [but rather it is the] State that [...] must elucidate [these matters]. To claim [...] that the clarifications made by the Court in its judgment regarding the military entity to which the attackers belonged [...] and their number was equal to determining criminal responsibilities can only be the result of a wrongful interpretation, denoting disagreement



with the judgment.” It also reveals an erroneous understanding of the particular nature of criminal responsibility, which cannot be determined without the full identification of the individuals on whom this responsibility falls, a matter not addressed in the judgment.” In addition, and given that the Court “respects the domestic jurisdiction, it is assumed that guarantees of due process will be respected in the investigation and trial with regard to the facts. To claim the contrary [would] imply indicating that [the Court] was [potentially] responsible for human rights violations arising from the execution of the mandate that the Convention confers on it.” The representatives also affirmed that the Court had not incurred in any form of prejudgment. This would only have occurred “if the matter upon which it had ruled [...] were the same as that upon which the Mexican ministerial and jurisdictional instances will have to rule.” The Court deals with State responsibility, based on the American Convention, and the national jurisdictional authorities with subjective criminal responsibility, in application of the provisions of domestic law.

24. Finally, the representatives asserted that the State had interpreted “the judgment in bad faith, in order to justify the presentation of its request.” The judgment clearly established that the acts committed by the military personnel against the victim were not limited to those verified in the sphere of the search for justice, but rather encompassed what happened when Mrs. Fernández Ortega was raped and tortured. This is so evident from the judgment that to reach the State’s conclusions “could be the result of a process contrary to the principle of *pacta sunt servanda*.” The State “used a deliberately wrongful interpretation to argue an alleged lack of clarity in the judgment that in actual fact was non-existent.” The meaning and scope of the judgment are clear and a request for interpretation is only admissible if the aspects of the judgment whose meaning requires clarification are related to the operative paragraphs of the judgment. In this case, the Court not only ordered the State to conduct the pertinent investigation into the facts, but also indicated criteria to be followed in complying with this obligation, obviating the “need for the respective paragraphs to be clarified by the Court’s interpretation.” Based on the foregoing, the representatives asked the Court to declare the State’s request inadmissible.

## 2. *Considerations of the Court*

25. The Court observes that, although the State’s assertions were divided into six sections, the truth is that Mexico’s allegations do not correspond to “six arguments,” but rather to a repetition, that can be summarized under the following aspects: (a) the competence of the Court to determine international responsibility in contrast to individual responsibility and the determination of the facts made by the Court in this case, and (b) the alleged violation by the Court of the principle of the presumption of innocence. The Inter-American Court will refer to these aspects, as well as to the interpretation of the expression “act committed by military personnel” questioned by the State.

### a) *General considerations*

26. The Court finds it appropriate to recall that, based on the probative elements presented to the Court, it found that the rape of Mrs. Fernández Ortega by a soldier in the presence of two other soldiers had been proved. Among other matters, this entailed a violation of her personal integrity, 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. The Court highlighted that “the fact of whether it was one or several State agents who raped Mrs. Fernández Ortega is not relevant” in order to determine the international responsibility of the State, and recalled “that it is not incumbent on the Court to determine individual responsibilities [...], the determination of which falls under the jurisdiction of the domestic criminal courts, but rather to examine the facts brought before it and to evaluate them in the exercise of its contentious jurisdiction in accordance with the evidence presented by the parties.”

27. The Inter-American Court arrived at this conclusion based, *inter alia*, on the following elements: (a) the victim’s testimony; (b) the military presence in the area on the day of the facts; (c) the official expert assessment of the sperm bioscopy and the acid phosphate analysis; (d) the psychological evaluation of Mrs. Fernández Ortega; (e) the testimony of the victim’s daughter who was present on the day of the events; (f) the testimony of other witnesses who were present shortly after the rape and assisted the victim, and (g) the fact that, more than eight years after the attack, the State has not offered any evidence that would contradict that it occurred. The Court indicated that the State could not justify itself exclusively based on ignorance of whether the violation had occurred and its authorship when this was a result of its own errors or irregularities by destroying evidence in its custody.<sup>8</sup> To conclude otherwise would entail allowing the State to hide behind the negligence and ineffectiveness of the criminal investigation to evade its responsibility for violating the right recognized in Article 5 of the American Convention.

28. Additionally, the Court found that the State was internationally responsible for violating Mrs. Fernández Ortega’s rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2 thereof. Furthermore, the Court found that the State had failed to comply with the

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<sup>8</sup> The Court established in the judgment that “the samples taken from the victim were inexplicably used up or thrown away by the experts, preventing other tests from being carried out; some of them of fundamental importance, for example, DNA.” In this regard, the State acknowledged:

[...] before the Court, the destruction of the gynecological evidence owing to the lack of diligence in handling it. The poor technical handling of the evidence by the experts in charge, added to an error in its chain of custody, resulted in its destruction [...]. This involuntary error, resulting from a lack of skill and technical capacity of the personnel of the local Attorney General, as well as the impact of this fact on the subsequent development of the investigations, are circumstances that the State has acknowledged fully, even in 2003, when the National Human Rights Commission ruled on the loss of this evidence.

[...]

The Mexican State acknowledges the lack of skill that resulted in the loss of the evidence as well as the consequences that this loss has had on the development of the investigations.

obligation established in Article 7(b) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women to the detriment of the victim. In addition to the facts recognized by the State,<sup>9</sup> the Court has considered proved, *inter alia*, the following omissions and irregularities in the investigation: (a) an official of the Public Prosecution Service initially refused to accept Mrs. Fernández Ortega's complaint, a situation which required the intervention of another public servant to make the first official comply with his legal obligation; (b) the victim, who at the time did not speak Spanish, was not provided with the assistance of an interpreter, but rather had to be assisted by an acquaintance, which, in the Court's opinion was not appropriate to respect her cultural diversity, to ensure the quality of the content of her statement, and to protect the confidentiality of the complaint; (c) it was not guaranteed that the minimum attention and privacy due to the victim of this type of offense would be respected when the rape complaint was made; to the contrary, the complaint was made in a place with other people present, and the victim could even have been heard by people she knew; (d) there was no immediate investigation of the crime scene; rather, it took place 12 days after the complaint had been made. Furthermore, there is no record that the authorities in charge of the investigation collected or obtained the immediate evidence on other elements such as the clothes that Mrs. Fernández Ortega was wearing on the day of the events; (e) the victim was not provided with appropriate medical and psychological care, and (f) scientific evidence was not protected. To the contrary, as Mexico has admitted, the evidence collected during the victim's medical examination was handled inadequately. Even though the Court appreciated the adoption of certain measures, it indicated that the State's actions were insufficient and, in some cases, inappropriate to meet the requirements of due diligence in a rape investigation.

29. The Court has already determined in the admissibility requirements that a request for interpretation should seek clarity or precision in the operative paragraphs of the judgment or in considerations that have a bearing on the operative paragraphs thereof (*supra* para. 11). In this case, the State requested the interpretation of certain paragraphs of the judgment without specifying their possible relevance to the operative paragraphs; the only exception to this is the reference or connection that the State makes to the eleventh operative paragraph of the judgment, with the request that this paragraph be clarified. This operative paragraph clearly and precisely orders the State to conduct the investigation efficiently and within a reasonable time and, as appropriate, the criminal proceedings that it is processing in relation to the rape of Mrs. Fernández Ortega, in order to determine the corresponding criminal responsibilities and to apply, as appropriate, the punishments and other consequences established by law, all in accordance with paragraphs 228 to 230 of the judgment.

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<sup>9</sup> The State acknowledged its international responsibility in relation to the following facts: the delay in providing medical care; the lack of specialized medical personnel in the agency of the Public Prosecution Service in Ayutla de los Libres; the inability to provide medical and psychological attention; the destruction of the gynecological evidence owing to lack of diligence in handling it; the error 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 any conclusive decisions on the offense and the probable authors. Nevertheless, it asserted that it had not violated other rights of the American Convention or any other inter-American legal instrument.

30. In this regard, the Court observes that, in its references to the eleventh operative paragraph of the judgment, Mexico correctly understands “the State’s obligation to maintain any inquiries that may be initiated against military personnel within the ordinary jurisdiction”; that “the State is ordered to continue its investigations in the ordinary jurisdiction even if it is decided to investigate military personnel and file proceedings against them,” and that the military system of justice is the inappropriate jurisdiction for the investigation of human rights violations. This reveals that the State understood the simple and clear mandate arising from the Court’s judgment. Furthermore, the Court underscores that, in its request for interpretation, the State itself affirmed that “in the eleventh operative paragraph, the Court ordered [the State] to conduct the investigations and, as appropriate, to file criminal proceedings against those who are found responsible so that the competent judicial authority may decide whether criminal responsibility exists and, if appropriate, apply the legal punishments and consequences.” Thus, the Court ordered that the competent authorities of the domestic system of justice determine the corresponding criminal responsibilities. Consequently, there is no lack of clarity in the Court’s decision in the operative paragraph in question, and the State has revealed this in its arguments, so that the request submitted by Mexico in this regard is inadmissible.

31. Moreover, the Court observes that the State is attempting to make the Court rule on factual and legal issues upon which it has already adopted a decision (*supra* para. 12). Specifically, it indicated that, since the preliminary inquiry into the facts is underway in the domestic jurisdiction, investigations into the alleged offenses committed continue and they will determine the corresponding responsibilities, as well as whether State agents were involved. The foregoing reveals that Mexico questioned the Court’s competence to establish the proven facts in this case and the consequent declaration of international responsibility. This Court’s case law has established repeatedly that a request for interpretation of judgment shall not be used as a means to contest the decision of which an interpretation is sought (*supra* para. 11). Consequently, the interpretation requested on this aspect is also inadmissible.

*b) Material competence of the Court*

32. Notwithstanding the above, and with regard to the Court’s alleged lack of competence to determine individual criminal responsibilities, the Court advises the State that its consistent case law is expressly affirmed in the judgment. From reading the judgment, it is clear that the Court has not exceeded its competence, nor has it determined individual criminal responsibilities. In its request for interpretation brief, Mexico equates the determination of the State’s international responsibility for the acts of its agents with the determination of individual criminal responsibilities. The latter would require, among other matters, the individualization and identification of the alleged perpetrators and their respective criminal punishments, which cannot be deduced from the judgment. In fact, the Court did not evaluate the conduct of possible authors of the facts under domestic criminal law, nor did it include dogmatic reasoning or arguments on the interpretation of criminal law or rule on the punishment or what this should consist of. To the contrary, in accordance with the basic principles of international law, in order to establish whether the State’s international responsibility is entailed in a case submitted to its consideration, the

Inter-American Court must determine whether its agents have committed an act or omission. Thus, the decision as to whether the State has incurred international responsibility entails the examination of the acts of the agents of the different State organs and bodies. Consequently, in any case in which the Court has found the international responsibility of the State concerned, it has found that this arose from an act or omission of one or more State agents.

*c) Presumption of innocence*

33. Regarding the Court's alleged violation of the principle of presumption of innocence, this Court has indicated that this principle is one of the pillars of judicial guarantees,<sup>10</sup> since it means that the accused does not have to prove that he has not committed the offense of which he is charged, because the *onus probandi* corresponds to his accuser,<sup>11</sup> and it establishes that a person may not be sentenced and convicted unless his criminal responsibility has been fully proved. Furthermore, the Court has held that this principle is an essential element for the effective exercise of the right to defense and accompanies the accused during the processing of the proceedings until a final judgment determining his guilt has been delivered.<sup>12</sup> In this regard, the presumption of innocence is violated if, before the accused is found guilty, a judicial decision concerning him indicates that he is guilty.<sup>13</sup>

34. As the Court has mentioned previously, the judgment in this case did not determine any individual criminal responsibility for the rape of the victim (*supra* para. 32), and State agents were not specifically individualized and identified. Consequently, the Court cannot be attributed with any violation of the presumption of innocence. Indeed, the Court has established clearly in its case law that the presumption of innocence corresponds to "any person accused of a crime,"<sup>14</sup> and it is not incumbent on the Court, under its competence as an international human rights court, to prosecute or convict individuals. What is striking about the State's argument is that it suggests that the Court,

<sup>10</sup> Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of the Inter-American Court of Human Rights of November 12, 1997. Series C No. 35, para. 77; *Case of Chaparro Álvarez and Lapo Ñiñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of the Inter-American Court of Human Rights of November 21, 2007. Series C No. 170, para. 145, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010 Series C No. 220, para. 182.

<sup>11</sup> Cf. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of the Inter-American Court of Human Rights of August 31, 2004. Series C No. 111, para. 154, and *Case of Cabrera García and Montiel Flores v. Mexico*, *supra* note 10, para. 182.

<sup>12</sup> Cf. *Case of Ricardo Canese v. Paraguay*, *supra* note 11, para. 154, and *Case of Cabrera García and Montiel Flores v. Mexico*, *supra* note 10, para. 183.

<sup>13</sup> *Case of Cabrera García and Montiel Flores v. Mexico*, *supra* note 10, para. 184.

<sup>14</sup> Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs*. Judgment of the Inter-American Court of Human Rights of September 18, 2003. Series C No. 100, para. 129; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of the Inter-American Court of Human Rights of November 17, 2009. Series C No. 206, paras. 119 to 121, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of the Inter-American Court of Human Rights of November 23, 2010 Series C No. 218, para. 205.

in its task of determining the State's international responsibility by verifying that the violations were the consequence of the acts of State agents, has violated the principles established in the Convention, the treaty that the Court applies and interprets, and compliance with which it monitors by means of its case law. Moreover, the Court ordered that the competent national authorities determine the individual criminal responsibilities, and it will be in the context of these investigations that the State must ensure compliance with the judicial guarantees referred to in its brief.

*d) Interpretation of “act committed by military personnel”—military jurisdiction*

35. Lastly, in section “(a) Object of the interpretation” of the request for interpretation, Mexico asked the Court to confirm whether the reference to the “act committed by military personnel against Mrs. Fernández Ortega,” in paragraph 177 of the judgment, “is restricted to the assessment made by the Court [...] regarding the intervention of the military justice system in the investigation into the facts and, therefore, does not constitute prejudgment with regard to the alleged perpetrators of the violations described in that paragraph.”

36. The contested paragraph is sufficiently clear. The Court notes that the purpose of the question posed by the State in its request for interpretation is not to clarify or define more accurately the content of any operative paragraph of the judgment, nor to determine the meaning of the judgment due to a lack of sufficient clarity or precision in its operative paragraphs or in its considerations. The interpretation of this fragment that Mexico is requesting does not derive from the literal meaning of what was indicated in that paragraph or in any other part of the judgment, and cannot be sustained logically. The fragment questioned by the State makes clear that a rape committed by military personnel bears no relationship to the military mission or discipline and, consequently, its investigation is excluded from the competence of military courts.

## VI OPERATIVE PARAGRAPHS

37. Therefore,

### **THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

pursuant to Article 67 of the American Convention on Human Rights and Articles 31(3) and 68 of its Rules of Procedure,

**DECIDES:**

Unanimously,

1. To reject the request for interpretation of the judgment on preliminary objection, merits, reparations, and costs delivered on August 30, 2010, in the terms of paragraphs 25 to 36 of this judgment.
2. To order the Secretariat of the Court to notify this judgment to the United Mexican States, the representatives of the victims, and the Inter-American Commission on Human Rights.

Done at Panama City, Panama, on May 15, 2011, in the Spanish and English languages, the Spanish text being authentic.

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