

OEA/Ser.L/V/II.159
Doc. 60
30 November 2016
Original: Spanish

REPORT No. 51/16

CASE 11.564

ADMISSIBILITY AND MERITS REPORT (PUBLICATION)

GILBERTO JIMÉNEZ HERNANDEZ ET AL (LA GRANDEZA)
MEXICO

Approved by the Commission at its at its session No. 2069 held on November 30, 2016.
159th Regular Period of Sessions.

IACHR, Report No. 51/16, Case 11.564. Merits. Gilberto Jiménez Hernández et al (La Grandeza).
México. November 30, 2016.



Organization of
American States

REPORT No. 51/16
CASE 11.564
 ADMISSIBILITY AND MERITS (PUBLICATION)
 GILBERTO JIMÉNEZ HERNANDEZ ET AL (LA GRANDEZA)
 MEXICO
 NOVEMBER 30, 2016

CONTENTS

I.	SUMMARY	1
II.	PROCEEDINGS BEFORE THE IACHR.....	1
III.	POSITIONS OF THE PARTIES.....	2
	A. Petitioners' Position.....	2
	B. State's Position.....	5
IV.	ANALYSIS OF COMPETENCE AND ADMISSIBILITY	6
	A. Commission's Competence <i>ratione personae</i> , <i>ratione loci</i> , <i>ratione materiae</i> and <i>ratione temporis</i>	6
	B. Exhaustion of Domestic Remedies.....	7
	C. Timeliness of the Petition	7
	D. Duplication of Procedures and International <i>res judicata</i>	8
	E. Colorable Claim.....	8
V.	ANALYSIS OF THE MERITS	8
	A. Proven facts	8
	1. Context.....	8
	2. Events occurring on February 19 and 20, 1995	11
	3. Investigation of events in the domestic arena.....	18
	B. Legal Analysis.....	24
	1. Right to life and the principle of equal treatment and non-discrimination (Article 4 of the American Convention in connection with Articles 1.1 and 2 of the same instrument)	25
	2. The right to a fair trial and judicial protection with regards to the investigations opened by the prosecutor's offices into the death of Gilberto Jiménez Hernández.....	32
	3. The right to a humane treatment with regard to the investigations by the prosecutors into the death of Gilberto Jiménez Hernández to the detriment of his next of kin.	40
VI.	DEVELOPMENTS FOLLOWING THE ADOPTION OF REPORT No. 73/15	41
VII.	DEVELOPMENTS FOLLOWING THE ADOPTION OF REPORT NO. 34/16.....	43
VIII.	ANALYSIS OF COMPLIANCE WITH THE RECOMMENDATIONS	44
IX.	FINAL CONCLUSIONS AND RECOMMENDATIONS.....	44
X.	PUBLICATION	45

REPORT No. 51/16
CASE 11.564
ADMISSIBILITY AND MERITS
GILBERTO JIMÉNEZ HERNÁNDEZ ET AL (LA GRANDEZA)
MEXICO¹
NOVEMBER 30, 2016

I. SUMMARY

1. On January 9, 1996, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition lodged by the Fray Bartolomé de las Casas Human Rights Center and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”) alleging international responsibility of the United Mexican States (hereinafter “Mexico,” “the State” or “the Mexican State”) for the alleged extrajudicial execution of Gilberto Jiménez Hernández, a Tzeltal indigenous man and member of the La Grandeza Community.

2. According to the account in the petition, on February 20, 1995, officers of the Mexican Army extrajudicially executed the alleged victim as he was fleeing from military troops along with his family and other members of the La Grandeza *ejido* community in the Municipality of Altamirano, State of Chiapas, Mexico. The petitioners claimed that the crimes charged in this petition were investigated in the civilian federal and state jurisdiction, as well as in the military jurisdiction. They argued that, despite the investigations, the perpetrators of the crimes have gone unpunished. As for the requirement of prior exhaustion of domestic remedies, they claim the State’s argument is that the petitioners’ are required to accept the military jurisdiction as the suitable means to investigate the death of a civilian at the hands of a member of the armed forces.

3. In response, the Mexican State contended that the death of Gilberto Jiménez Hernández came about as a result of a confrontation between members of the Zapatista National Liberation Army, an armed group to which the alleged victim belonged, and members of the Mexican Army. As for admissibility of the case, the State argued failure to exhaust available domestic remedies in the military jurisdiction, as well as remedies in the ordinary federal jurisdiction to question the proceedings before the military criminal courts, specifically with reference to *amparo* proceedings for enforcement of constitutionally guaranteed rights. Regarding the merits of the matter, the State claimed that it has fully met its obligations to respect and ensure the allegedly violated rights.

4. After examining the available information, the Commission ascertained that the admissibility requirements set forth in Articles 46 and 47 of the American Convention have been fulfilled and concluded that the State is responsible for the violation of the right to life, humane treatment, a fair trial, equal treatment and non-discrimination and judicial protection, as provided for in Articles 4.1, 5.1, 8.1, 24 and 25.1 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of the individuals listed in each section of the instant report.

II. PROCEEDINGS BEFORE THE IACHR

5. The initial petition was lodged on January 9, 1996 and was assigned the number 11.564. In a note of January 11, 1996, the IACHR forwarded the relevant portions of the petition to the State, requesting it to provide a response within a 90-day period, in keeping with the Rules of Procedure in force at the time. Following the IACHR granting of two extensions, the Mexican State filed its reply on May 16, 1996, which was duly forwarded to the petitioners. On October 17, 1996, the petitioners requested that Human Rights Watch Americas be included as co-petitioner in the case.

¹ As provided in Article 17.2 of the Commission’s Rules of Procedure, Mexican national Commission member José de Jesús Orozco Henríquez did not take part in the discussion or the decision on the instant case.

6. As the petition was undergoing processing, the petitioners submitted additional observations on July 8, 1996, April 24, 1997, October 6, 1997, September 20, 1999 and October 18, 2000. The State submitted information on August 30, 1996, October 6, 1997 and November 1, 1999. These briefs were duly forwarded to each party.

7. In a note of December 2, 2002, the IACHR conveyed to the parties its decision to postpone addressing admissibility of the petition until the discussion and decision on the merits of the matter, as provided for under Article 37.3 of the Rules of Procedure in effect at the time. On that date, the IACHR gave the petitioners a period of two months to submit their arguments on the merits. It also gave the parties the same period of time to express their interest in pursuing the friendly settlement process.

8. On November 30, 2005, the petitioners submitted those observations, which were properly forwarded to the State, which was given a period of two months, in keeping with Article 38.1 of the Rules of Procedure in force at the time, to submit its observations on the merits. After being granted an extension, the Mexican State submitted its observations on the merits of the case on April 3, 2006.

9. Subsequently, the petitioners provided additional information on August 14, 2008, September 15, 2008, May 4, 2009 and November 16, 2011. While the State submitted additional information on April 10, 2006, January 27, 2009 and June 22, 2009. These briefs were appropriately forwarded to the opposing party.

10. As the case was being processed before the Commission, two public hearings were held. The first one took place on October 6, 1997, during the 97th Regular Session of the IACHR. The second hearing was held on October 17, 2005, on the occasion of the 123rd Regular Session of the IACHR.

III. POSITIONS OF THE PARTIES

A. Petitioners' Position

11. The petitioners alleged extrajudicial execution of Gilberto Jiménez Hernández, a Tzeltal indigenous man, by agents of the military forces of the Mexican State, on February 20, 1995 at the *ejido* community of La Grandeza, Municipality of Altamirano, State of Chiapas, Mexico.

12. By way of context, they contended that beginning in the early 1980s, human rights violations had been documented in Chiapas and, in 1994, an armed conflict broke out in that state. They claimed that on January 1, 1994, hundreds of individuals belonging to the Zapatista National Liberation Army (hereinafter "the EZLN") took over public buildings and offices in several municipalities of Chiapas in order to claim their rights. They noted that, as of that date, the presence of the Mexican National Army significantly increased and that the "1994 Chiapas Campaign Plan," designed by the Secretariat of National Defense in 1994, laid out the objectives of the military intervention: "to destroy and break up the military political structure of the EZLN." They reported that "the Federal Government ordered a massive incursion into Chiapas against the EZLN" and the Army went into more than thirty communities of the region. They alleged that arbitrary detentions, torture, due process violations, wrongful raids of private property, destruction of property, among other human rights violations, were committed during these operations.

13. The petitioners claimed that Gilberto Jiménez Hernández was executed in this context. Specifically, they recounted that on February 19, 1995, the word went around in the La Grandeza community alerting the residents that a unit of nearly 500 troops was about to arrive. They contended that several families, including Mr. Jiménez Hernández's, decided to seek refuge in a nearby mountain located about 2 km south of the community. They asserted that the following day, between 13:00 and 15:00 hours, a reconnaissance patrol of the 17th Infantry Battalion of the "Yabur" Group, made up of 54 troops, intercepted seventy individuals, who had fled La Grandeza, mostly women, children and elderly, all members of the Tzeltal indigenous people. They contended that, in response, all of the civilians ran off in the opposite direction from the troops.

14. They argued that Gilberto Jiménez Hernández, his wife, Elena Gómez Entzin and their ten children were among the group of residents who fled the community of La Grandeza out of fear of being reached by the members of the Army. They claimed that “the troops began shooting and the group of residents dispersed into the surrounding areas, attempting to hide in the weeds.” They asserted that Gilberto Jiménez Hernández attempted to hide but was unable to because he was carrying his young daughter “tied to his back with a shawl.”²

15. They claimed that infantry private Abner García Torres found him and ordered him, in Spanish, to stop. They added that, following the soldiers’ orders, he lied down on the ground and that, despite following the commands given, “without any reason or prior notice,” the soldier “shot him, with no regard for the fact that Gilberto was carrying his daughter on his back, from a distance of approximately eight meters away.” They contended that one of the bullets penetrated his right eye causing his immediate death, and that his wife and children were eyewitnesses to the execution. They alleged that the members of the Army did not allow the child that was being carrying on the back of the body of her father to be removed, but made her remain there for several hours after he was killed. They asserted that three individuals allegedly linked to the EZLN were detained by the military troops in the operation.

16. They alleged that the incidents charged in the petition were investigated by different officials. Particularly, they claimed that the Federal Ministry of Public Prosecution of Tuxtla Gutierrez opened the preliminary investigation, which was identified as No. 66/1/95, in order to determine whether the three detained individuals were criminally responsible, but not to investigate the killing of Gilberto Jiménez Hernández. They asserted that they were unable to obtain further information regarding this preliminary investigation, despite Mr. José Jimenez, the brother of the alleged victim, filing a request to the Office of the Attorney General of the Republic (hereinafter “the PGR”).

17. The petitioners asserted that on February 24, 1995, the Office of the Military Attorney General ordered the Office of the Military Prosecutor to open a preliminary investigation into the death of Mr. Jiménez Hernández. They contended that the family was never notified that this proceeding was taking place and that “the military investigation lacked the required impartiality” and was closed on February 1, 1996.

18. They noted that on June 27, 1995, unaware of the other investigations, the alleged victim’s brother José Jiménez filed a complaint with the State Ministry of Public Prosecution. They contended that on July 7, 1995, the State Ministry of the Public Prosecution in Altamirano opened a preliminary investigation, which was assigned the number 096/89/95 and was transferred to the Federal Public Prosecutor’s Office in Tuxtla Gutierrez. They claimed that, based on information provided to them by the National Human Rights Commission (hereinafter “the CNDH”), the case file went missing from that office as a result of a flood in 1997. They also noted that the matter was brought to the attention of the CNDH, though it did not issue any recommendation at all.

19. Regarding prior exhaustion of domestic remedies, the petitioners argue that they attempted to pursue the suitable remedy, which is to file a complaint with the Ministry of Public Prosecution in order for an investigation to be opened and those responsible to be punished. They contended that this complaint gave rise to a preliminary investigation whose case file was lost, as noted above. They asserted that in light of the unwarranted delay in the administration of justice, the exceptions to the requirement of prior exhaustion of domestic remedies were applicable.

20. In response to the State’s arguments, they claimed that they were precluded from taking action against the Military Prosecutor’s neglect. They asserted that even though Article 21 of the Constitution was amended to allow challenges in court to decisions of the Ministry of Public Prosecution to not criminally prosecute a case, this constitutional amendment was not regulated at the time of the events. They contended

² Regarding the age of the young girl, the petitioners wrote in the initial petition that she was two-months old and, in subsequent submissions, they wrote that she was 5-years old at the time of the events.

that in the absence of a law, Mexican courts continued to deny *amparo* claims. They further argued that, notwithstanding, *amparo* is not a suitable remedy to ensure appropriate punishment of those responsible for the execution of Gilberto Jiménez Hernández and proper reparation for his next of kin.

21. As for the State's argument that they should have gone to the Secretariat of National Defense (hereinafter "SEDENA") to report irregularities in the military investigation, the petitioners contended that it is not a suitable remedy and that they are not required to resort to that body, inasmuch as the investigation should have been conducted in the ordinary jurisdiction. They further argued that a complaint with SEDENA could lead to an administrative punishment but not to investigation and punishment of those responsible for the violation.

22. The petitioners contended that, generally speaking, the State's line of argument regarding exhaustion of domestic remedies is meant to "force the petitioners to accept the military jurisdiction as the suitable means to investigate the death of a civilian at the hands of a member of the military."

23. With regard to the merits of the matter, the petitioners argued that the Mexican State breached its obligation to respect the right to life, inasmuch as the alleged victim was executed by an agent of the Mexican Army. They contended that the State has not provided reliable evidence to prove that Private Abner García acted in legitimate self-defense, nor has it proven "that Mr. Gilberto Jiménez was even armed on the day that the events took place" or, even if he were armed, that he posed a threat so as to warrant being shot to death. They claimed that this was actually a case of excessive use of force by the aforementioned Army private, which was "completely unnecessary, unrestrained and disproportionate." They further contended that the State breached its obligation to prevent the execution of Gilberto Jiménez, because the strain between the two armed forces made the area where he resided a focus of conflict. They claimed that consequently, "after the incursion of the Mexican Army, the State should have taken the necessary preventive measures to protect the civilians that inhabited said area." They further argued that the civilians who were fleeing, including the alleged victim, were protected under Common Article 3 of the Geneva Conventions, inasmuch as they were not directly participating in the hostilities.

24. As for the violation of the right to a fair trial and judicial protection, the petitioners argued that the military criminal jurisdiction lacks the necessary independence and impartiality. They claimed that the basic steps were not taken to fully, exhaustively and impartially investigate the case. They contended that the duty set forth in Article 2 of the Convention was violated, because Article 57.11 of the Code of Military Justice was in force at the time. Regarding the civilian criminal proceedings, they argued that the investigation violated due process rights and was ineffective, because preliminary investigation 66/1/95 lasted only two days, was based on evidence collected by the Military Judicial Police and failed to include basic elements of an investigation. As to preliminary investigation 096/89/95, which was conducted before the Ministry of Public Prosecution of Altamirano, they claimed that it was transferred to the federal civilian jurisdiction without the family members being notified or receiving any information about the case file until they were informed that it had been lost in the flood. After that time, the family was not told of any attempt to reconstruct the evidence in the file.

25. They also alleged a violation of the right to equal treatment because of the "discrimination and contempt with which the victim's family members were treated." They contended that "when the Jiménez family goes to the Ministry of Public Prosecution to request information, the response is that Zapatistas are not going to be given anything and that the claim will not be successful." Lastly, they claimed a violation of the right to humane treatment to the detriment of the next of kin of Gilberto Jiménez Hernández as a result of the alleged denial of justice and the suffering endured by them over the years since the death of their loved one.

B. State's Position

26. The Mexican State claimed that "National Army infantry private first class, Abner García Torres –in legitimate self-defense – caused the death of Gilberto Jiménez Hernández." It asserted that on February 20, 1995, members of the Mexican Army, belonging to the 17th Infantry Battalion, assigned to the "ARCOIRIS" [‘RAINBOW’] Task Force in the "YABUR" Group were conducting a surveillance run in the area around the *ejido* La Grandeza, when "they came upon by surprise members of the Zapatista National Liberation Army communicating with each other by radio." It contended that said persons attempted to escape and that when instructed to stop, "they replied with gunfire, which forced private Abner García Torres to fend off the assault, thus killing the individual who in life went by the name of Gilberto Jiménez Hernández." It argued that the death "occurred as a result of an armed confrontation that arose between the members of the group calling itself [...] EZLN, to which Jiménez Hernández belonged."

27. The State asserts that no women or children were present at the time and in the place of the events, or that it has been proven that the alleged victim was carrying his youngest daughter on his back. It claimed that based on the chemical forensic evidence collected by the experts of the Office of the Attorney General of the State of Chiapas (hereinafter "the PGJ"), the result of the autopsy and the statements of civilians and members of the military, the way he was shot dead and the fact that he actively participated in the confrontation against the Army could be determined. It asserted that two 22 caliber rifles; one thousand four hundred 22 caliber rounds of ammunition; radio transmitters; solar energy generator; and EZLN attire were found at the scene of the crime. As for the general context and the offensive of February 1995 referenced by the petitioners, it contended that those facts are not the subject of the case.

28. With regard to the investigation, the State asserted that on February 21, 1995, an assistant prosecuting attorney of the Federal Ministry of Public Prosecution ordered preliminary investigation 66/1/95 to be opened and that several tasks be conducted in the investigation. It claimed that the Prosecutor's Office decided to not pursue criminal prosecution against the three persons detained for alleged links to the EZLN, because on March 11, 1995, the "Law for Dialogue, Conciliation and Dignified Peace in Chiapas" was enacted, which instructed that all criminal prosecutions and arrest warrant executions against EZLN members be held in abeyance.

29. It claimed that in conducting the respective tasks of the investigation, the agent of the Federal Office of Public Prosecution "did not find evidence to support criminal prosecution" in determining that "Mr. Gilberto Jiménez Hernández died during a confrontation with military personnel." It noted that it requested the involvement of ballistic and chemistry experts, who concluded using the sodium rhodizonate residue test that traces of lead and barium were detected on Gilberto Jiménez Hernández's hand as a product of gunshots. It argued that the expert ballistics analysis concluded that "the weapons seized from the scene of the crime had been fired." It further argued that, based on the autopsy report, it could be inferred that "Gilberto Jiménez was facing the soldier slightly to the left when the shot was fired, rendering it materially impossible for events to have transpired as recounted by the petitioners."

30. The State also contended that on February 24, 1995, the Office of the Attorney General of Military Justice ordered the Military Prosecutor's Office to open a preliminary investigation into the events. It reported that this measure was taken in keeping with Article 13 of the Political Constitution of the United Mexican States and with Article 57 of the Code of Military Justice. It asserted that during this preliminary investigation, which was assigned the identification number of ADFTA/01/95/E, no criminal liability was found, inasmuch as the mitigating circumstance of legitimate self-defense was applicable in this case and, accordingly, the case was closed on February 1, 1996.

31. Regarding admissibility, the State argued that the petitioners did not resort to SEDENA to report any irregularity in the investigation conducted in the military justice system, even though "severe punishments" could have been imposed through this proceeding. It also claimed failure to exhaust domestic

remedies in the federal justice system with respect to the proceedings of the Office of the Military Prosecutor. Particularly, it contended that the petitioners could have brought an indirect *amparo* proceeding.³ Additionally, it argued the failure to exhaust by means of an administrative complaint with the Office of the Inspector of the Office of the Attorney General of Chiapas for the alleged irregularities of the Office of the Public Prosecutor of Altamirano in the conduct of the preliminary investigation.

32. With regard to the merits, the State rejected the petitioners' arguments and claimed that Mexico has fulfilled its duty to prevent "in having in place the legal, political, administrative and cultural means to promote respect for the right to life." It also argued that "it has met its obligation to investigate the violation of the right to life, so that that crime does not go unpunished." It contended that the investigation to prosecute and punish those responsible was undertaken and that even though no criminal punishment was established in the end on the grounds of a mitigating circumstance that is insufficient to prove impunity.

33. It contended that it has met the duty to prevent violations of the right to humane treatment, inasmuch as local and federal provisions of (civilian and military) law ensure that potential violations of this right are treated as a criminal offense that is punishable. It claimed that there is no evidence to presume that the alleged victim's family has been physically affected nor have any complaints been brought to that effect.

34. As for the right to a fair trial and judicial protection, it argued that "the petitioners at all times had their right to be heard with due process guarantees by a competent, independent and impartial, previously established authority to rule on their rights in the quest to elucidate the death of Gilberto Jiménez Hernández."

35. With respect to the proceeding before the IACHR, the Mexican State claimed that a "procedural imbalance in the processing of the case" has arisen, because the petitioners showed periods of procedural inactivity and the average length of time the Commission takes to rule in other petitions and cases related to Mexico has been surpassed. According to the State, this has given rise to a situation of legal uncertainty.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

36. The petitioners are entitled, under Article 44 of the American Convention, to lodge petitions with the Commission. The petition also names as alleged victims individuals, who were under the jurisdiction of the Mexican State at the time of the alleged events. Consequently, the Commission is competent *ratione personae* to examine the petition. The Commission is competent *ratione loci* to hear the petition, inasmuch as it alleges violations of the American Convention, which are said to have taken place within the jurisdiction of a State party to said instrument.

37. Likewise, the IACHR is competent *ratione materiae*, because the petition alleges possible violations of the American Convention. The Commission is also competent *ratione temporis* inasmuch as Mexico acceded to the American Convention on March 24, 1981 and, consequently, the obligation to respect and ensure the rights protected in the American Convention was already in force on the State when the facts alleged in the petition are said to have occurred.

³ As legal grounds for the remedy, it referenced the Amparo Law, Regulating Articles 103 and 107 of the Constitution; and the Decree of December 31, 1994, amending Article 21 of the Constitution to allow challenges in court to the decisions of the Office of the Public Prosecutor to not criminally prosecute. It claimed that even though no law had been approved to regulate said constitutional amendment, it was not required because several of the Collegial Circuit Courts had held that "that law already exists and the Amparo Law precisely establishes the appropriate means of challenge."

B. Exhaustion of Domestic Remedies

38. As established under Article 46.1. of the American Convention, for a petition to be admitted pursuant to Article 44 thereof, domestic remedies must have been pursued and exhausted in keeping with generally recognized principles of international law. The prior exhaustion requirement is applicable when remedies, which are suitable and effective to cure the alleged violation, are actually available in the domestic system. In this regard, Article 46.2 provides that the requirement shall not be applicable when: a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

39. In order to examine whether the exhaustion of domestic remedies requirement has been met, the Commission must clarify what domestic remedies must be exhausted based on the circumstances. Adequate remedies mean those which are suitable to address an infringement of a legal right. In instances of alleged arbitrary deprivation of the right to life, irrespective of whether or not the perpetrators are State's agents or private individuals, the adequate remedy is an investigation and a criminal proceeding, which must be instituted and brought forward ex officio by the State in order to identify and punish those responsible.

40. In the instant case, it has not been disputed that even though the investigation into the alleged extrajudicial execution of Gilberto Jiménez Hernández was opened by the Federal Ministry of Public Prosecution, it was transferred to the military jurisdiction and culminated in the decision of the Military Prosecutor's Office to close the preliminary investigation, which was issued on February 1, 1996.

41. As the Commission has consistently held, the military jurisdiction does not constitute an appropriate forum and therefore does not provide adequate remedies for investigating, prosecuting and punishing those responsible for violation of the human rights enshrined in the American Convention.⁴ Accordingly, resorting to SEDENA, as the State argued the petitioners should have done, which involves raising potential shortcomings in the proceedings under military jurisdiction, is not suitable or effective. As for the remedy of *amparo*, the Mexican State did not prove that it was suitable or effective at the time when the facts of the case were being heard under the military jurisdiction in order to get them transferred to the ordinary jurisdiction.

42. Lastly, as to the investigation under the ordinary jurisdiction, which was opened as a result of the complaint filed by the family on June 27, 1995, the available information indicates that the case file thereof was lost in 1997 and no further information is available as to said investigation. Consequently, *prima facie*, the Commission finds that the State is guilty of unwarranted delay in providing a suitable and effective remedy vis-à-vis the incidents of this case. Ergo, the Commission finds that the exception set forth in Article 46.2.c of the American Convention is applicable.

C. Timeliness of the Petition

43. Article 46.1 b of the Convention provides that in order for a petition to be admissible before the Commission, it must be lodged within six months of the date on which the alleged victim was notified of the final decision adopted by domestic courts. In the claim under consideration, the IACHR has established that the exception to the rule of prior exhaustion of domestic remedies, as provided under Article 46.2 c) of the Convention is applicable. In this regard, Article 32 of the Commission's Rules of Procedure sets forth that when exceptions to prior exhaustion of domestic remedies are applicable, the petition must be lodged within

⁴ IACHR, Report No. 11/11, Petition 697-04, Admissibility, Jesús Reynaldo Aguirre Ching, Peru, March 22, 2011, par. 26; Report No. 39/10, Petition 150-06, Admissibility, Nélio Nakamura Brandão and Alexandre Roberto Azevedo Seabra Da Cruz, Brazil, March 17, 2010, par. 31; Report No. 47/08, Petition 864-05, Admissibility, Luis Gonzalo "Richard" Vélez Restrepo and family, Colombia, July 24, 2008, par. 74; Report No. 93/06, Petition 972-03, Admissibility, Valentina Rosendo Cantú et al, Mexico, October 21, 2006, par. 28; Report No. 94/06, Petition 540-04, Admissibility, Inés Fernández Ortega et al, Mexico, October 21, 2006, par. 24.

a reasonable period of time, as determined by the Commission. For this purpose, the Commission will consider the date on which the alleged violation occurred and the circumstances of each instance.

44. The Commission finds that under the provisions of Article 32 of its Rules of Procedure, the unwarranted delay exception is reasonable, inasmuch as the petition was lodged on January 9, 1996, almost one year after the events occurred, the investigation was being conducted under the military justice system and the complaint filed in the ordinary justice system had not moved forward.

D. Duplication of Procedures and International *res judicata*

45. Article 46.1.c of the Convention establishes that for a petition to be admitted, it must meet the requirement that the subject matter “of the petition or communication is not pending in another international proceeding for settlement” and Article 47.d of this instrument provides that the Commission shall not admit any petition that is “substantially the same as one previously studied by the Commission or by another international organization.” There is no evidence in the case file of these circumstances, which would render the petition inadmissible.

E. Colorable Claim

46. For purposes of admissibility, the Commission must decide whether the petition describes events that could constitute a violation of rights, as stipulated in Article 47.b of the American Convention, whether the petition is “manifestly groundless” or “out of order,” pursuant to subparagraph C of that article. The standard for assessing these requirements is different from the one used to judge the merits of the petition. The Commission must make a *prima facie* evaluation to determine whether the petition includes a basis for an apparent or potential violation of a right protected by the Convention, but not whether such a violation occurred. This determination is a summary examination, which does not prejudice or provide an advance ruling on the merits of the matter.

47. Neither the American Convention nor the IACHR Rules of Procedure require petitioners to identify the specific rights allegedly violated by the State in matters submitted to the Commission, even though the petitioners may do so. However, it is the duty of the Commission, in following the system of legal precedents, to determine in its admissibility reports, what provision of relevant Inter-American instruments is applicable and could be concluded to have been violated, should the alleged facts be proven by means of sufficient evidence and legal argument.

48. The IACHR finds that, should the alleged facts be true, they could constitute violations of the right to life, humane treatment, a fair trial, judicial protection and equal treatment and non-discrimination, as enshrined in Articles 4.1, 5.1, 8.1, 24 and 25.1 of the American Convention in connection with Articles 1.1 and 2 of the same instrument.

V. ANALYSIS OF THE MERITS

A. Proven facts

1. Context

49. The State of Chiapas is located in southeastern Mexico. In Chiapas, the indigenous population – which belongs to 10 different ethnic groups – comprises approximately 30% of the total population of 3 million inhabitants.⁵ Of the State’s 111 municipalities, 58 are predominantly or significantly indigenous.⁶

⁵ **Annex 1.** IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, The situation of the State of Chiapas, par. 540.

Until 1994, the State of Chiapas had been governed by a majority of the Institutional Revolutionary Party (PRI) at all political echelons.⁷ Additionally, it ranked among the lowest in socioeconomic conditions of Mexico, as well as having a long history of agrarian conflicts.⁸

50. In January 1994, the Zapatista National Liberation Army (hereinafter “the EZLN”) rose up in arms and took over the municipal seats of government of San Cristóbal de las Casas, Ocosingo, Altamirano and Las Margaritas, all of which are located in Chiapas.⁹ In response to the armed operations of the EZLN, as of January 1994, the role of the Mexican armed forces began to turn from national security to an increasingly more active role in domestic security¹⁰ and the presence of the Army on indigenous territories in Chiapas escalated.¹¹

51. In its 1998 *Report on the Situation of Human Rights in Mexico*, the Commission established as fact that over past years the presence of the armed forces in predominantly indigenous areas was on the rise and noted that it is directly linked to the counterinsurgent operations. Specifically, the IACHR wrote that it had been made aware of: “[...] the presence of Mexican Army camps in 46 municipalities of the state (41,4% of the total number of municipalities in Chiapas), with an occupation which included at least 111 indigenous communities.”¹²

52. In February 1995, the Mexican Army intended to take back the territory where the EZLN had been operating since the beginning of the conflict and launched the military response by implementing the SEDENA-designed strategy. Said strategy was drawn up in a document known as the “Chiapas 94 Campaign Plan,” a copy of which was included in the IACHR case file, and designed by said Secretariat in 1994 and implemented in 1995.¹³

53. As the document asserts verbatim, the Plan to be implemented was aimed at “breaking up the relationship of support [...] between the population and the law-breakers;” “secretly organizing certain sectors of the civilian population; among others, cattle ranchers, small-scaled land owners and individuals characterized as having a keen sense of patriotism, who would be used in support of the operations;” as well as “training and supporting the self-defense forces or other paramilitary organizations” [and] “in the event no self-defense forces exist, [...]create them.”¹⁴ The Plan also states that “the possibility that the EZLN may be supported in the political structures of the Democratic Revolution Party should not be discarded.”¹⁵

⁶ **Annex 1.** IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, The situation of the State of Chiapas, par. 540.

⁷ **Annex 2.** HRW. Mexico. *Waiting for Justice in Chiapas*. A report by Physicians for Human Rights and Human Rights Watch/Americas. 1994. p. 7. Annex 1 to petitioners’ submissions received on September 15, 2008.

⁸ **Annex 2.** HRW. Mexico. *Waiting for Justice in Chiapas*. A report by Physicians for Human Rights and Human Rights Watch/Americas. 1994. p. 7. Annex 1 to petitioners’ submissions received on September 15, 2008.

⁹ **Annex 2.** HRW. Mexico. *Waiting for Justice in Chiapas*. A report by Physicians for Human Rights and Human Rights Watch/Americas. 1994. p. 7. Annex 1 to petitioners’ submissions received on September 15, 2008.

¹⁰ **Annex 3.** Amnesty International. Mexico: Disappearances: a black whole in the protection of human rights. Annex 3 to petitioners’ submissions received on September 15, 2008.

¹¹ **Annex 4** UN. Office of the United Nations High Commissioner for Human Rights in Mexico. *Diagnostico de la situación de derechos humanos en México [Assessment of the Human Rights Situation in Mexico]*. 2003. p. 155 – 157. **Annex 5.** UN. Human Rights and Indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental liberties of indigenous people, Rodolfo Stavenhagen, December 23, 2003, E/CN.2/2004/80/Add, par. 43. **Annex 1.** IACHR. *Report on the situation of human rights in Mexico*. OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, par. 522-531.

¹² **Annex 1.** IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, par. 526.

¹³ **Annex 6.** Document “1994 Chiapas Campaign Plan.” Annex 2 to petitioners’ submission received on September 15, 2008.

¹⁴ **Annex 6.** Document “1994 Chiapas Campaign Plan.” Annex 2 to petitioners’ submission received on September 15, 2008.

¹⁵ **Annex 6.** Document “1994 Chiapas Campaign Plan.” Annex 2 to petitioners’ submission received on September 15, 2008.

54. The Plan defined “enemy forces” as “organizations of the masses” regarded as a “fundamental part and most important element of the Maoist strategy.”¹⁶ This sector was made up, according to this document, of “actual or front organizations in the sectors of: Teachers, Students, Grass Roots, Labor, Ethnic Groups, Religious, Peasants, Others.”¹⁷

55. As that Plan was implemented, the Army intruded on communities or *ejidos* in the State of Chiapas. In this context, numerous human rights violation complaints were filed against those responsible, mostly, members of the Mexican Army.¹⁸ Charges of forced disappearances, extrajudicial executions, torture, arbitrary detentions, among other ones, were widely documented by the United Nation’s international agencies¹⁹ as well as by non-governmental organizations.²⁰ By an account of Human Rights Watch, in reference to February 1995, “[at this time, civilians endured the impact more than the EZLN combatants, because the federal and state police surrounded the alleged Zapatistas in what they regarded as hiding places outside of the combat zone [...].”²¹

56. Similarly, in its 1998 *Report on the Human Rights Situation in Mexico*, the IACHR wrote: “in several instances it has been alleged that the military presence means restrictions on the right to free circulation, because check points are set up on the roads and, in some instances, temporarily prevent freedom of movement in some communities.”²² Additionally, as the Commission has ascertained with regard to Chiapas:

In recent years, two situations have adversely affected the observance of human rights: the insurgency of the Zapatista Army of National Liberation (EZLN) in the southern region, which has led to a large Army presence deployed in low-intensity operations in this area; subsequently, and mainly after 1995, the militarization of the northern region and the emergence there of paramilitary groups which have been accused of committing human rights violations.²³

¹⁶ **Annex 6.** Document “1994 Chiapas Campaign Plan,” item I.B.3. Annex 2 to petitioners’ submissions received on September 15, 2008.

¹⁷ **Annex 6.** Document “Chiapas 1994 Campaign Plan,” item I.B.3. Annex 2 to petitioners’ submissions received on September 15, 2008.

¹⁸ **Annex 4.** UN. Office of the United Nations High Commissioner for Human Rights in Mexico. *Diagnostico de la situación de derechos humanos en México [Assessment of the Human Rights Situation in Mexico]*. 2003. p. 155 – 157. **Annex 5.** UN. Human Rights and Indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental liberties of indigenous people, Rodolfo Stavenhagen, December 23, 2003, E/CN.2/2004/80/Add, par. 38.

¹⁹ **Annex 7.** UN. Commission on Human Rights. Working Group on Forced and Involuntary Disappearances. Annex 4 to petitioners’ submissions received on September 15, 2008. **Annex 8.** UN. ECOSOC. Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Mr. Bacre. E/CN.4/1998/68/Add.1 September 19, 1997. Annex 5 to petitioners’ submissions received on September 15, 2008. **Annex 9.** UN. Human Rights Commission. Special Rapporteur on all Persons subjected to any form of Detention or Imprisonment, Sr. Nigel Rodley, E/CN.4/1998/38/Add.2, February 14, 1998. Annex 8 to petitioners’ submissions received on September 15, 2008.

²⁰ **Annex 3.** Amnesty International. Mexico: Disappearances: a black hole in the protection of human rights. Annex 3 to petitioners’ submissions received on September 15, 2008. **Annex 10.** Human Rights Watch. *Mexico, torture and other abuses during the 1995 crackdown on alleged Zapatistas*. February 1996, vol. 8 no. 3(B), Part I. Summary and Recommendations. Annex 7 of petitioners’ submissions received on September 15, 2008. **Annex 11.** Amnesty International. *Mexico, under the shadow of impunity*. March 9, 1999. Annex 9 to petitioners’ submission received on September 15, 2008.

²¹ **Annex 12.** Human Rights Watch. *Deberes incumplidos: Responsabilidad oficial por la violencia rural en México*. Chapter “Impunidad por violaciones cometidas en la lucha contra el EZLN”. Annex 6 to petitioners’ submission received on September 15, 2008.

²² **Annex 1.** IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, par. 526.

²³ **Annex 1.** IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter VII, The situation of indigenous peoples and their rights, par. 544.

57. Additionally, in the framework of the individual petition and case mechanism, the Commission took a position on charges of human rights violations in the context of the counterinsurgency in Chiapas. Specifically, in the case of Severiano and Hermelindo Santiz Gómez "Ejido Morelia," the Commission established that "on August 6 or 7, 1996, members of the Mexican Army entered the indigenous community of Morelia, in the Municipality of Altamirano, State of Chiapas" finding that the Mexican State was responsible for the illegal detention, torture and deaths of three members of the community in said context.²⁴ Likewise, in the case of Ana, Beatriz and Celia González Pérez, the Commission established as fact that the three sisters were arbitrarily detained in June 1994 at a military check point located on the road leading to the Jalisco *ejido* community, in the Municipality of Altamirano, Chiapas, and were subjected to an illegal interrogation, while violations of humane treatment were committed against them, including rape.²⁵

58. On top of the foregoing, there was an overall context of impunity for human rights violations committed by the members of the military forces, as was established as fact in several reports of international agencies and civil society organizations. In this regard, Human Rights Watch summed up the situation as follows:

No officials have been held accountable for any of the abuses that took place in the name of fighting the EZLN. For the most part, the army insists that it investigated alleged abuses but found no evidence of violations. [...] Civilian authorities have been no more forthright than the army, insisting, for instance, that no detainees had been tortured, and failing to take any action against officials responsible for well-documented abuses committed in February 1995.²⁶

59. Similarly, in his report, which was approved following the visit to Mexico in August 1997, UN Special Rapporteur on all Persons Subjected to any form of Detention or Imprisonment Nigel Rodley noted that "military personnel seem to be immune to civilian justice and generally protected by military justice." Consequently, he recommended that "cases of serious crimes committed by military personnel against civilian citizens, in particular, torture and other cruel, inhuman or degrading treatment or punishment, should, regardless of whether they took place in performance of military service, be heard by civilian justice."²⁷

2. Events occurring on February 19 and 20, 1995

60. The *ejido* La Grandeza community is located in the Municipality of Altamirano, in the State of Chiapas. Gilberto Jiménez Hernández, member of the *ejido* La Grandeza, was born on September 30, 1951 and at the time of the events was 43 years of age.²⁸ He was married to Elena Gómez Entzín and had ten children: Antonio, 23 years old; Martin, 21 years old; Manuel, 19 years old; Flor,* 18 years old; Eva, 14 years old; Gilberto, 12 years old; Rogelio, 10 years old; José, 8 years old; Margarita, 6 years old; and Ana Maria,

²⁴ IACHR. Report N° 48/97. Case 11.411. Severiano and Hermelindo Santiz Gómez "Ejido Morelia". Mexico. February 18, 1998.

²⁵ IACHR. Report N° 53/01. Case 11.565. Ana, Beatriz and Celia González Pérez. México. April 4, 2001.

²⁶ **Annex 12.** Human Rights Watch. *Deberes incumplidos: Responsabilidad oficial por la violencia rural en México. [Implausible Deniability: State Responsibility for rural Violence in Mexico]* Chapter "Impunity for violations committed in fighting the EZLN." Annex 6 to petitioners' submission received on September 15, 2008.

²⁷ **Annex 9.** UN. Commission on Human Rights. Special Rapporteur on all Persons Subjected to any Form of Detention or Imprisonment, Sr. Nigel Rodley, E/CN.4/1998/38/Add.2, January 14, 1998. Annex 8 to petitioners' submission received on September 15, 2008. pars. 86 and 88j.

²⁸ **Annex 13.** Birth certificate of Gilberto Jiménez Hernández. Documents received by the IACHR on January 16, 2007.

* The name on the document is illegible.

three years old, at the time of the events.²⁹ Around February 1995, ejido La Grandeza was legally incorporated by approximately 350 people, mostly women and children.³⁰

61. On Saturday February 18, 1995, the Mexican Federal Army launched a campaign on the land occupied by La Grandeza.³¹ That day, military forces detained Rafael Gómez Velasco and Mariano Santiz Jiménez, who were on their way to their jobs in the fields and were released the next day. According to the information made available to the Commission, “their detention cause panic among the residents [...]”³² On February 19, 1995, the word was going around in La Grandeza that the Army was about to arrive. According to an official document of the Mexican Army, the reconnaissance patrol arrived in La Grandeza community, it belonged to the 17th Infantry Battalion assigned to the “ARCOIRIS” Task Force in the “YABUR” Group, and was made up of 65 military members, three of which were officers and the remaining 62 men were “troops.”³³ Based on the same document, they were jointly carrying as weapons “3 MP5 Cal. 9mm and 62 G-3 Cal. 7.62mm.”³⁴ Accounts from witnesses to the task force recount that green airplanes were spotted flying over the *ejido* lands.³⁵

62. As a result of abuses committed by members of the Army against the residents of other nearby settlements, news of their arrival prompted the departure of the population from the community and several families opted to seek refuge in the mountain.³⁶ Once the soldiers were on the *ejido* lands, “they took the clothes and bedding from the homes (...) and burned them.”³⁷ It was noted that the Army placed “piles of rocks at several spots around the community, which according to witnesses, were placed by members of the Federal Army and used as trenches and surveillance and inspection posts.”³⁸ Complaints were filed for unlawful entry and disappearance of food, clothes and documents from the homes of the community members.³⁹

63. Military authorities denied in official documents the presence of military personnel on La Grandeza and the entry into homes there too. In official letter No. 548, the Mexican Army Brigadier General detailed to the area asserted that “no military personnel belonging to the groups established in this

²⁹ **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Public Prosecutor’s Office on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

³⁰ **Annex 15.** On-site inspection conducted at Ejido La Grandeza by the agent of the Federal Prosecutor’s Ministry on February 21, 1995. Annex 1 to petitioners’ submission received on December 9, 2005.

³¹ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Based on said document, it was made by a delegation of the CONPAZ Human Rights Commission, which traveled to ejido La Grandeza on February 23, 1995. Annex 2 to petitioners’ submission received on December 9, 2005.

³² **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005.

³³ **Annex 17** Mexican Army. Fatiga. Reconnaissance patrol Ejido La Grandeza, Chiapas. 17/0 BTN. DE. INF. Annex 17 to the State’s submission received on April 10, 2006.

³⁴ **Annex 17.** Mexican Army. Fatiga. Reconnaissance patrol Ejido La Grandeza, Chiapas. 17/0 BTN. DE. INF. Annex 17 to the State’s submission received on April 10, 2006.

³⁵ **Annex 14.** Sworn statement provided by Elena Gómez Entzín (spouse) on August 16, 1995 and sworn statement given by Manuel Jiménez Gómez (son) on January 9, 1996 to the Office of the Public Prosecutor. Annexes 3 and 4 to petitioners’ submission received on December 9, 2005.

³⁶ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

³⁷ **Annex 16.** Appeal for emergency action issued by the CONPAX Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005.

³⁸ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

³⁹ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

settlement have entered during this year into Ejido La Grandeza.”⁴⁰ Likewise, in official letter No. 21314 from the 7th Military Region, Military Staff, July 2, 1995, General Mario Renán Castillo Fernández wrote that: “[...] prior to and following the events, which occurred on February 20 of this year in the environs of the aforementioned *ejido*, at no time did any military personnel belonging to that Military Force enter inside the homes of the settlement.”⁴¹

64. The group that fled La Grandeza out of fear of the arrival of the Army consisted of approximately 70 people, 27 of whom were men ranging from teenagers to old age, and the remaining 40 people were women and children.⁴² These individuals, wearing civilian attire, departed so hastily that they were unable to take food and had to sleep in the open air exposed to the elements.⁴³ This group of people included the family of Mr. Jiménez Hernández, who sought refuge in a mountain located between the *ejido* communities of Patziwuitz of the Municipality of Ocosingo and La Grandeza of the Municipality of Altamirano, along with other families from their *ejido*.⁴⁴ They spent the night of February 19, 1995 at that location.

65. Given that the Army members did not find most of the members of the *ejido*, around 8:00 AM on February 20, 1995, Army “reconnaissance patrols” headed out in two sections, each one made up of 27 members.⁴⁵ At the same time, the members of the *ejido*, who were hiding out in the mountain, sent one of their own, a man named Sebastián Mena López, to find out what was happening in the settlement and to bring food back to them.⁴⁶ Nonetheless, at approximately 9:00 AM, he was found and detained by a military patrol on the edges of La Grandeza *ejido*. According to the testimony of Sebastián Mena, the Army troops asked him “where his fellow community members were located, and he replied that he didn’t know where they were. He was pressured and beaten three times on the side of his body at waist level and on the nape of his neck.”⁴⁷ As a result, “he told them where the other community members were located, leading them to the top of a mountain that was approximately three kilometers away from the *ejido*.”⁴⁸

66. When they arrived at the location, based on statements of Elena Gómez Entzín, the wife of the alleged victim, “they began to fire at those who were on the ground [...] they were wearing green and [were] armed.”⁴⁹ Based on interviews of the community members of La Grandeza some days after the events, the

⁴⁰ **Annex 20.** Official Letter No. 548 issued by the Mexican Army Brigadier General. Annex to petitioners’ submission submitted on April 24, 1997.

⁴¹ **Annex 21.** Official Letter No. 21314 from the 7th Military Region, Staff, July 2, 1995. Annex to petitioners’ submission submitted on April 24, 1997.

⁴² **Annex 22.** Statement to Prosecutor’s Office given by Sebastián Mena López on February 21, 1995. Annex 7 to petitioners’ submission received on December 9, 2005 and Annex 3 to the State’s submission received on April 10 2006.

⁴³ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005. **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005. **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Office of the Public Prosecutor, on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

⁴⁴ **Annex 14.** Sworn statement provided by Elena Gómez Entzín (spouse) on August 16, 1995 and sworn statement given by Manuel Jiménez Gómez (son) on January 9, 1996 to the Office of the Public Prosecutor. Annexes 3 and 4 to petitioners’ submission received on December 9, 2005.

⁴⁵ **Annex 23.** Statement given by private Abner García Torres to the Prosecutor on February 21, 1995. Annex 9 to petitioners’ submission received on December 9, 2005 and Annex 6 to the State’s submission received on April 10, 2006.

⁴⁶ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005.

⁴⁷ **Annex 22.** Statement of Sebastián Mena López given to the Public Prosecutor on February 21, 1995. Annex 7 to petitioners’ submission received on December 9, 2005 and Annex 3 to State’s submission received on April 10, 2006.

⁴⁸ **Annex 22.** Statement of Sebastián Mena López given to the Public Prosecutor on February 21, 1995. Annex 7 to petitioners’ submission received on December 9, 2005 and Annex 3 to State’s submission received on April 10, 2006

⁴⁹ **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Public Prosecutor’s Office on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

Human Rights Commission of the Non-Governmental Organizations Coordinator for Peace (CONPAZ) described events as follows: “when the soldiers found the makeshift refuge of the peasant farmers, they started to fire continuously on the group, which was running away terrified, as the soldiers shouted swear words at them.”⁵⁰

67. Additionally, according to a report of the Indigenous Delegation Pueblo Por la Paz, headed by the National Intermediation Commission (CONAI), based on testimonies of *ejido* members: “when the Army arrived at the site where the people were located, it opened fire with a hail of machine gun shots with no advance warning. This action caused the persons to panic [...] The immediate reaction was to seek safety by fleeing in the opposite direction from where the soldiers arrived, they had to escape through the most rugged part of the mountain.”⁵¹ According to this same report, the rough conditions of the terrain where they attempted to seek refuge caused several people to get trapped between the thick vegetation and federal troops.⁵² One of them was Mr. Jiménez Hernández,⁵³ who based on this account, “found himself facing a soldier, who when he saw him shot him from eight meters away, hitting him in the eye and killing him instantaneously.”⁵⁴ Following the attack, the body of the alleged victim was lying face down.⁵⁵

68. According the testimony of Manuel Jiménez Gómez, the alleged victim’s son, who was 2 meters away from his father, moments before the events, he was gathered with other fellow community members at the end of the mountain, along with women, children, teenagers and elderly people. He noticed that the Army troops were climbing up the mountain and when he heard three loud shots, he ran off down the mountain. According to his account: “he believes that when his father turned he was shot in the face.”⁵⁶ Other statements given to the Office of the Public Prosecutor by individuals who were present at the time of the events claim to have heard “approximately three fire arm shots, but didn’t know who had fired those shots.”⁵⁷

69. At that time, Mr. Jiménez Hernández was carrying one of his daughters on his back.⁵⁸ Based on his wife’s testimony, “as she was walking along she realized that her husband was lying down and the little

⁵⁰ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005.

⁵¹ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

⁵² **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejido* communities of Emiliano Zapata and La Grandeza, April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

⁵³ **Annex 19.** Report of the Indigenous Delegation of Pueblo Por la Paz to *ejidos* Emiliano Zapata and La Grandeza of April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

⁵⁴ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners’ submission received on December 9, 2005. According to the report of the Indigenous Delegation of the Pueblo Por la Paz, Gilberto Jiménez Hernández was found by the soldier because of the following reason: “When the Army brought the disorganized fleeing under control by surrounding the trapped people, the soldiers asked if they were defeated. Mr. Gilberto Jiménez Hernández said he was. When the soldiers asked whether he had weapons, he responded by stating that he didn’t. Then one of the soldiers, guided by his voice because the vegetation prevented a clear view of where [he was] and since the persons were under arrest, he responded with a burst of shots, with a bullet hitting him in the left eye killing him immediately.” **Annex 19** Report of the Indigenous Delegation of Pueblo Por la Paz to the *ejidos* of Emiliano Zapata and La Grandeza April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

⁵⁵ Annex 14. Sworn statement given by Elena Gómez Entzín to the Office of the Public Prosecutor, on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005. **Annex 24.** Statement given by private Limberg Salvador Chable to the Public Prosecutor’s Office on February 21, 1995. Annex 30 to petitioners’ submission received on December 9, 2005 and Annex 4 to the State’s submission received on April 10, 2006.

⁵⁶ **Annex 25.** Statement given by Manuel Jiménez Gómez to the Public Prosecutor’s Office on February 21, 1995. Annex 24 to the petitioners’ submission received on December 9, 2005 and Annex 8 to the State’s submission received on April 10, 2006.

⁵⁷ **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Public Prosecutor’s Office on February 21, 1995. Annex 6 to the petitioners’ submission received on December 9, 2005 and Annex 7 to the State’s submission received on April 10, 2006.

⁵⁸ While several documents, including some from official government sources, consistently say that he was carrying one of his children on his back, there are discrepancies as to the sex and age of the little boy or girl. The statement of the family members is that it was his daughter Margarita Jiménez Gómez. **Annex 14.** Sworn statement given by Elena Gómez Entzín (spouse) on August 16, 1995 and

baby girl that he was carrying on his shoulders remained perched on top of her deceased husband.”⁵⁹ According to statements, she remained tied on her father’s back for a lapse of approximately two hours because the soldiers did not allow anyone to remove her.⁶⁰ The alleged victim’s wife, Elena Gómez Entzín, was able to see that “her husband was bleeding from the back of his head and that his left eye [...] had been shot out, [...] he was lying face down.”⁶¹

70. In their statements to officials from the prosecutor’s office, members of the Mexican Army described the events differently. According to a report provided by Captain Gerardo Serna Melchor, who was in charge of the squadron that conducted the operation, to the Commanding Brigadier General of the “Yabur” Group, dated February 20, 1995, “in conducting reconnaissance of a mountain, the name of which I do not know, voices in [Tzeltal] dialect were overheard [...], as we approached the undersigned [Captain Serna Melchor] managed to see a group of civilians around another one who was speaking by radio, it was also apparent that some of them were carrying long barrel weapons in their hands and, consequently, he proceeded to tell them to stop, when the civilians heard the command to stop, they ran down hill in the opposite direction of the mountain, they were told to stop, with the undersigned firing three warning shots into the air.”⁶² As for the specific events leading to the death of the alleged victim, based on the aforementioned report, “infantry private Abner García Torres told a law-breaker to halt, when the law-breaker turned around he fired on the aforementioned soldier, who consequently fired back fending off the assault and killing the person who was known in life by the name of Gilberto Jiménez Hernández.”⁶³

71. According to the statement given to the prosecutor by private Abner García, he moved ahead with three other soldiers toward the top of a mountain where he heard “the murmuring of voices in dialect and then caught up with his fellow soldiers about three steps ahead [...] and he observed a person speaking by CB radio without understanding what he was saying because he was communicating in dialect.”⁶⁴ He stated that there were eight other people there, “some were carrying long barrel guns and some were not carrying guns.”⁶⁵ He asserted that when they noticed their presence, they fled down the mountain and

sworn statement given by Manuel Jiménez Gómez (son) on January 9, 1996 to the Public Prosecutor’s Office. Annexes 3 and 4 to petitioners’ submission received on December 9, 2005. According to the Report of the Indigenous Delegation of the Pueblo Por la Paz “his eight-month old son was tied to his back and he was holding the hand of his three year old daughter as he was lying on the ground as ordered by the soldiers.” **Annex 18.** Report of the Indigenous Delegation of Pueblo Por la Paz to the *ejidos* of Emiliano Zapata and La Grandeza April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005]. Another document that describes that he was holding one of his children on his back at the time of the events is Official Letter 340/96 of December 4, 1996, send by the Federal Judicial Police to the Federal Office of the Public Prosecutor as part of preliminary investigation 40/996. **Annex 27.** Annex 20 to the State’s submission received on April 10, 2006.

⁵⁹ **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Office of the Public Prosecutor, on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

⁶⁰ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the *ejidos* Emiliano Zapata and La Grandeza of April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005. **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Office of the Public Prosecutor, on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

⁶¹ **Annex 14.** Sworn statement given by Elena Gómez Entzín to the Office of the Public Prosecutor, on August 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.

⁶² **Annex 28.** Report submitted by Captain Gerardo Serna Melchor to the Commanding Brigadier General of the “Yabur” Group, dated February 20, 1995. Annex 8 to petitioners’ submission received on December 9, 2005 and Annex 1 to State’s submission received on April 10, 2006.

⁶³ **Annex 28.** Report given by Captain Gerardo Serna Melchor to the Commanding Brigadier General of the “Yabur” Group, dated February 20, 1995. Annex 8 to petitioners’ submission received on December 9, 2005 and Annex 1 to State’s submission received on April 10, 2006.

⁶⁴ **Annex 23.** Statement given by private Abner García Torres to the Prosecutor’s Office on February 21, 1995. Annex 9 to petitioners’ submission received on December 9, 2005 and Annex 6 to State’s submission received on April 10, 2006.

⁶⁵ **Annex 23.** Statement given by private Abner García Torres to the Prosecutor’s Office on February 21, 1995. Annex 9 to petitioners’ submission received on December 9, 2005 and Annex 6 to State’s submission received on April 10, 2006.

consequently he commanded them to stop by shouting to them “halt stop.” Private García Torres described the subsequent events as follows:

The person that was running away behind the others stopped and turned around toward the declarant firing some shots, but was unable to say exactly how many, he also heard behind him several shots believing up until now that they were support [shots], then he proceeded to take cover and return the fire of the assault getting about three rounds off in the direction of the aforementioned individual, who fell to the ground, and consequently other persons who were fleeing stopped, and lied down on the ground because the declarant so ordered them when he noticed that there were women and children further down the hill who were also trying to escape [...] that when the victim and the declarant were shooting at each other they were approximately 15 meters away from each other, that he did not know the region of entry of the bullet but that he did observe that the body presented an exit orifice in the back of the head, that the position the body was lying in was face down with his feet facing the declarant and the head away from him, that this final position was because the individual was in a shooting position known as three quarters so that when he was hit by the bullet he turned to right and fell into the position that was just mentioned.⁶⁶

72. The three Army privates who were together with Abner García Torres, made statements to the Public Prosecutor to the effect that he [Abner] shot several times into the air and next they heard shots from a lower caliber weapon than the ones used by the Army and, therefore, private Abner García fired 3 or 4 more times to fend off the attack.⁶⁷ Additionally, the three concurred in stating that they did not shoot at all at the time and location of the events.⁶⁸ One of them testified that after the shots, “they also heard noises from women and children and that is why his squad stopped firing.”⁶⁹

73. In contrast with these accounts, according to the statements of his wife, son and other persons present at the time, Mr. Jiménez Hernández was not carrying a gun in his hands at the time of the events.⁷⁰ Additionally, based on records issued by public officials, the alleged victim was wearing civilian attire, was not wearing any garment exclusively belonging to the security forces or garments that were unmistakably characteristic of the Zapatista uniform. In this regard, the death certificate issued by the Special Military Prosecutor’s Office on February 21, 1995 notes that he was wearing “[...] black plastic boots, dark pants, white T-shirt, yellow sweater and a blue shawl around his neck.”⁷¹ Additionally, according to the

⁶⁶ **Annex 23.** Statement given by private Abner García Torres to the Prosecutor’s Office on February 21, 1995. Annex 9 to petitioners’ submission received on December 9, 2005 and Annex 6 to State’s submission received on April 10, 2006

⁶⁷ **Annex 29.** Statement given by private Pablo de la Cruz Pérez to Prosecutor’s Office on February 21, 1995. Annex 10 to petitioners’ submission received on December 9, 2005 and Annex 9 to State’s submission received on April 10, 2006. **Annex 30.** Statement given by private Manuel Hermida Rodríguez to the Prosecutor’s Office on February 21, 1995. Annex 11 to petitioners’ submission received on December 9, 2005 and Annex 10 to State’s submission received on April 10, 2006. **Annex 24.** Statement given by private Limberg Salvador Chable to Prosecutor’s Office on February 21, 1995. Annex 30 to petitioners’ submission received on December 9, 2005 and Annex 4 to State’s submission received on April 10, 2006.

⁶⁸ **Annex 31.** Statements given to the Military Prosecutor’s Office on April 25, 1995 by Infantry Second Captain Gerardo Serna Melchor, Infantry Corporal Pablo de la Cruz Pérez, and privates Abner García Torres, Limber Salvador Chable and Manuel Hermida Rodríguez. Annex 39 to petitioners’ submission received on December 9, 2005.

⁶⁹ **Annex 24.** Statement given by private Limberg Salvador Chable to Prosecutor’s Office on February 21, 1995. Annex 30 to petitioners’ submission received on December 9, 2005 and Annex 4 to State’s submission received on April 10, 2006.

⁷⁰ According to his wife’s statements, “he was not carrying a weapon nor was he wearing the colors of the Army.” **Annex 32.** Addendum to sworn statement given by Elena Gómez Entzín to the Public Prosecutor’s Office, September 16, 1995. Annex 3 to petitioners’ submission received on December 9, 2005.] Additionally, in the statement given by Ramiro Alfonso Hernández to the Prosecutor’s Office on February 21, 1995, it is written that “moments before the Army climbed up, Gilberto Jiménez was afraid that they would come up, and therefore was hiding among the trees on top of the mountain, and he noticed at that time that he [Jiménez] was not carrying any fire arm on him.” **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Prosecutor’s Office on February 21, 1995. Annex 6 to petitioners’ submission received on December 9, 2005 and Annex 7 to State’s submission received on April 10, 2006.]

⁷¹ **Annex 33.** Death certificate issued by the Special Military Prosecutor’s Office on February 21, 1995. Annex 20 to petitioners’ submission received on December 9, 2005.

inspection visit certificate written by the Federal Prosecutor's Office on the same date, he was wearing "a light colored shirt, with a cat figure print on it, black pants and black boots."⁷² Available information suggests that the Zapatista uniform was characterized as being "black pants and brown shirt, black rubber boots, some wear a balaclava or a bandana to cover their face."⁷³

74. After the events described above, the Army detained three individuals, allegedly linked to the EZLN, named Sebastián Mena López, Ramiro Alfonso Hernández and Manuel Jiménez Gómez, the son of the alleged victim.⁷⁴ In the statements given by the detainees on February 21, 1995 to the Public Prosecutor's Office, it is noted that all three of the men claimed to belong to the EZLN and that they did not have any position or duty, but that they carried out auxiliary tasks, such as carrying back packs.⁷⁵ According to the CONPAZ Human Rights Commission, "the three men stated that they were beaten by the Army members while they were being held."⁷⁶

75. Additionally, in the aforementioned report issued by Captain Gerardo Serna Melchor on February 20, 1995, it is on record that "when the area used as a camp by the lawbreakers was inspected, several items were found among their belongings [...] including two 22 cal. Rifles and approximately 1400 rounds of the same caliber [...]."⁷⁷ According to the statement made by the alleged victim's son, Manuel Jiménez Gómez, when the Mexican Army was shooting at him, his father was approximately 4 meters away from the location where these items were seized.⁷⁸

76. According to statements of his wife and of individuals detained in the operation, Gilberto Jiménez Hernández had become a member of the EZLN months before the events.⁷⁹ In the statements given by the three detained men to the Public Prosecutor's Office, it is noted that the alleged victim did not have any rank or position within the armed group, he performed auxiliary duties by carrying backpacks and was not issued fire arms.⁸⁰

⁷² **Annex 15.** Inspection visit conducted at Ejido La Grandeza by the agent of the Federal Ministry of Public Prosecution on February 21, 1995. Annex 1 to petitioners' submission received on December 9, 2005. Similarly, **Annex 33.** Death certificate issued by the Special Military Prosecutor's Office on February 21, 1995. Annex 20 to petitioners' submission received on December 9, 2005.

⁷³ **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Prosecutor's Office on February 21, 1995. Annex 6 to petitioners' submission received on December 9, 2005 and Annex 7 to State's submission received on April 10, 2006. **Annex 22.** Statement given by Sebastián Mena López to Prosecutor's Office on February 21, 1995. Annex 7 to petitioners' submission received on December 9, 2005 and Annex 3 to State's submission received on April 10, 2006.

⁷⁴ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners' submission received on December 9, 2005.

⁷⁵ **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Prosecutor's Office on February 21, 1995. Annex 6 to petitioners' submission received on December 9, 2005 and Annex 7 to State's submission received on April 10, 2006. **Annex 22.** Statement given by Sebastián Mena López to Prosecutor's Office on February 21, 1995. Annex 7 to petitioners' submission received on December 9, 2005 and Annex 3 to State's submission received on April 10, 2006. **Annex 25.** Statement given by Manuel Jiménez Gómez to the Prosecutor's Office on February 21, 1995. Annex 24 to petitioners' submission received on December 9, 2005 and Annex 8 to State's submission received on April 10, 2006.

⁷⁶ **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners' submission received on December 9, 2005.

⁷⁷ **Annex 28.** Report given by Captain Gerardo Serna Melchor to the Commanding Brigadier General of the "Yabur" Group, dated February 20, 1995. Annex 8 to petitioners' submission received on December 9, 2005 and Annex 1 to State's submission received on April 10, 2006.

⁷⁸ **Annex 25.** Statement given by Manuel Jiménez Gómez to the Prosecutor's Office on February 21, 1995. Annex 24 to petitioners' submission received on December 9, 2005 and Annex 8 to State's submission received on April 10, 2006.

⁷⁹ **Annex 32.** Addendum to sworn statement given by Elena Gómez Entzín to the Public Prosecutor's Office, September 16, 1995. Annex 3 to petitioners' submission received on December 9, 2005.

⁸⁰ **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Prosecutor's Office on February 21, 1995. Annex 6 to petitioners' submission received on December 9, 2005 and Annex 7 to State's submission received on April 10, 2006. Annex X. Statement given by Sebastián Mena López to Prosecutor's Office on February 21, 1995. Annex 7 to petitioners' submission received on December 9, 2005 and Annex 3 to State's submission received on April 10, 2006

77. The Army's incursion onto *ejido* La Grandeza lasted until February 22, 1995 and caused several people to be displaced and missing for days.⁸¹

3. Investigation of events in the domestic arena

Proceedings of the commanding officer of the Patrol in his capacity as Military Judicial Police

78. The day of the death of the alleged victim, February 20, 1995, the commanding officer of the Military Patrol to which the members of the Army who conducted the incursion onto La Grandeza belonged, issued a report in performance of the duties of Military Judicial Police. In this report, he took the statements of the soldiers who were present at the time of the events and listed the items seized from the area.⁸²

79. According to statements of Army private Abner García Torres, which appear in said report, regarding the death of Mr. Jiménez Hernández, "the Company Commander was advised [of the death], who when he saw the body of the deceased, ascertained that he was truly lifeless and, therefore, we transferred the body to *ejido* La Grandeza, which is where our operations base was located."⁸³

80. On February 21, 1995 at 12:00 hours, the agent of the Special Military Prosecutor's Office of the "Yabur" group certified the death, indicating that he was at *ejido* Lázaro Cárdenas in the Municipality of Altamirano in the State of Chiapas and the body was "in a horizontal position with his face forward."⁸⁴ On that same date, a Mexican Army medical surgeon issued a medical certificate of death of the alleged victim noting on the record that the body presented a "firearm projectile wound with an entry orifice [...] and an exit orifice [...] the first [orifice] located in the right infra-orbital region and the second [orifice] [located] in the right occipital region with a malar fracture, multiple fracture of the parietal and right temporal, fracture of the occipital bone, affecting encephalic mass."⁸⁵

Preliminary Investigation 66/I/95 before the Federal Ministry of Public Prosecution

81. On February 21, 1995, the Deputy Attorney General of the Office of the Attorney General of the Republic and the Agent of the Office of the Federal Public Prosecutor of Tuxtla Gutierrez travelled to *ejido* La Grandeza. At this location, Brigadier General Brigadier Carlos Enrique Adam Yabur placed the body of Gilberto Jiménez, the three detained individuals and the seized items at their disposition.⁸⁶

⁸¹ **Annex 19.** Report of the Indigenous Delegation of the Pueblo Por la Paz to the ejidos Emiliano Zapata and La Grandeza on April 23, 1995. Annex 5 to petitioners' submission received on December 9, 2005. "As a result of this Federal Army operation, today [February 24, 1995] 29 persons remain lost on the mountain including three children of the executed peasant farmer." **Annex 16.** Appeal for emergency action issued by the CONPAZ Human Rights Commission on February 24, 1995. Annex 2 to petitioners' submission received on December 9, 2005.

⁸² **Annex 34.** Report of the Military Patrol commanding officer in his capacity as Military Judicial Police, filed at 20:00 hours on February 20, 1995. Annex 12 to petitioners' submission received on December 9, 2005 and Annex 2 to State's submission received on April 10, 2006.

⁸³ **Annex 34.** Report of the Military Patrol commanding officer in his capacity as Military Judicial Police, filed at 20:00 hours on February 20, 1995. Annex 12 to petitioners' submission received on December 9, 2005 and Annex 2 to State's submission received on April 10, 2006.

⁸⁴ **Annex 33.** Death certificate issued by the Special Military Prosecutor's Office on February 21, 1995. Annex 20 to petitioners' submission received on December 9, 2005.

⁸⁵ **Annex 35.** Forensic inspection of body of Gilberto Jiménez Hernández conducted by a Mexican Army medical surgeon on February 21, 1995. Annex 21 to petitioners' submission received on December 9, 2005 and Annex 18 to State's submission received on April 10, 2006.

⁸⁶ **Annex 36.** Certificate issued by the agent of the Public Prosecutor's Office at 13:00 hours on February 21, 1995. Annex 14 to petitioners' submission received on December 9, 2005.

82. At 14:00 hours on February 21, 1995, the agent of the Office of the Federal Public Prosecutor issued a certificate at La Grandeza attesting to the conditions of the body. According to this certificate, the body was located in a wooden cabin [...] on an improvised stretcher of wood.⁸⁷ It notes that you can see “encephalic mass broken off on the posterior skull, as well as a wound on the right cheek and blood flowing from the right ear.”⁸⁸ On this date and in this location, the agent of the Federal Prosecutor’s Office made a record of seizure in the operation of “two 22 caliber rifles, approximately one thousand and four hundred rounds of ammunition of the same caliber, some radio transmitters, a source of solar energy, [EZLN] garments, as well as other items.”⁸⁹

83. The Agent of the Federal Public Prosecutor’s Office ordered the three detainees and the body of Gilberto Jiménez to be transferred by helicopter to the city of Tuxtla Gutiérrez to conduct investigative proceedings on them. There appears in the case file ten photographs recorded in a document with the logo of the “Office of the Attorney General of the Republic,” depicting the time when they board the helicopter, one photo of a residence and the remaining eight photos of the items seized by the Army.⁹⁰

84. On that same day of February 21, 1995, the Office of the Federal Prosecutor of Tuxtla Gutiérrez opened the preliminary investigation identified by No. 66/I/95. Among the steps ordered to be taken in the decision to open the investigation was the taking of the statements of the three detainees; conduction expert chemistry tests, ballistics tests and identification of firearms; prosecutor’s certificate of death of Gilberto Jiménez Hernández; taking of statements of the military members who participated in the events, among other ones.⁹¹

85. In Official Letter No. 275 of February 21, 1995, the agent of the Federal Prosecutor’s Office in charge of preliminary investigation 66/I/95 requested expert chemist, ballistics and firearms reports.⁹² The chemist and ballistics expert witness examinations and reports were conducted and written by staff of the General Directorate of Expert Witness Services of the Office of the Attorney General of Justice of the State of Chiapas. Specifically, a Walker gunshot residue test was performed on “one orifice caused by a firearm projectile, on a short-sleeved, pullover, scope-neck, gray colored T-shirt, with no brand name on it and with a cat figure and the word Tom printed on the front.”⁹³ The expert opinion report concluded that “the presence of nitrites was not identified around the orifice caused by the firearm projectile located on the T-shirt described above.”⁹⁴ Additionally, expert witnesses performed Griess and Lunge reagent tests “to determine whether the black powder, inside of a transparent glass flask contains or is an explosive substance.” The

⁸⁷ **Annex 15.** Inspection visit conducted at Ejido La Grandeza by the agent of the Federal Prosecutor’s Office on February 21, 1995. Annex 1 to petitioners’ submission received on December 9, 2005.

⁸⁸ **Annex 15.** Inspection visit conducted at Ejido La Grandeza by the agent of the Federal Prosecutor’s Office on February 21, 1995. Annex 1 to petitioners’ submission received on December 9, 2005.

⁸⁹ **Annex 36.** Certificate issued by the agent of the Public Prosecutor’s Office at 13:00 hours on February 21, 1995. Annex 14 to petitioners’ submission received on December 9, 2005.

⁹⁰ **Annex 37.** Photographs taken by officials of the Office of the Attorney General of the Republic. Documents received by the IACHR on January 16, 2007.

⁹¹ **Annex 38.** Decision to open preliminary investigation issued on February 21, 1995 by the agent of the Office of the Public Prosecutor General. Annex 23 of petitioners’ submission received on December 9, 2005.

⁹² **Annex 39.** Official Letter No. 275 of February 21, 1995, sent by the agent of the Federal Public Prosecutor’s Office in charge of preliminary investigation 66/I/95 requesting expert chemist, ballistics and firearms opinion reports. Documents received by the IACHR on January 16, 2007.

⁹³ **Annex 40.** Expert witness report of the Walker evidence, official letter No. 2195 of February 21, 1995. Annex 25 to petitioners’ submission received on December 9, 2005 and Annex 14 to State’s submission received on April 10, 2006.

⁹⁴ **Annex 40.** Expert witness report of the Walker test evidence, official letter No. 2195 of February 21, 1995. Annex 25 to petitioners’ submission received on December 9, 2005 and Annex 14 to State’s submission received on April 10, 2006.

expert opinion report issued on February 21, 1995, indicated that when the tests were done on the black powder, the result was “negative for detection of nitrites.”⁹⁵

86. According to the expert’s report submitted in official letter No. 2195 of February 21, 1995, the sodium rhodizonate test was positive on both hands for Gilberto Jiménez Hernández and on the left hand for Sebastián Mena López.⁹⁶ According to the expert ballistics report of February 22, 1995, “the two rifle-type weapons have been fired to see if there is gunpowder deflagration residue inside the barrel and chamber, though the date or number of times they were fired cannot be accurately determined.”⁹⁷

87. There is also documentary evidence in the autopsy report dated February 21, 1995, conducted by the forensic medical expert of the General Directorate of Expert Services of the Office of the Attorney General of Justice of the State. According to said report, the body of the alleged victim:

Presents a wound caused by a circular shaped, one cm. diameter-wide firearm projectile, with inverted edges, with a scab on the upper edge, located in the right malar region 6 cm. away from the anterior medial line and 1.44 meters away from the plane of support. With a star-shaped exit orifice of 6 cm diameter with everted edges with expulsion of encephalic mass [...] and the presence of a second entry orifice by the same firearm projectile of 1.5 cms. Diameter, with circular concentric scab and inverted edges, located at the level of the right suprascapular region.⁹⁸

88. The body of Gilberto Jiménez Hernández was handed over to his brother on February 21, 1995.⁹⁹

89. In Official letter No. 277 of February 21, 1995, the agent of the Public Prosecutor’s office requested the National Indigenous Institute to appoint an expert Tzeltal language translator “in order for the Prosecutor’s Office to be able to take the statement” of the three detained persons.¹⁰⁰ According to the transcripts of the statements of Ramiro Alfonso Hernández, Sebastián Mena López and Manuel Jiménez Gómez, at that time, each one was appointed a public defender and two Tzeltal-to-Spanish translators.¹⁰¹

⁹⁵ **Annex 41.** Expert witness report of the Griess and Lunge tests evidence, official letter No. 2204 of February 21, 1995. Annex 26 to petitioners’ submission received December 9, 2005.

⁹⁶ **Annex 42.** Expert report on sodium rhodizonate test, official letter No. 2195 of February 21, 1995. Annex 27 to petitioners’ submission received on December 9, 2005 and Annex 15 to State’s submission received on April 10, 2006.

⁹⁷ **Annex 43.** Expert report on ballistics test, official letter No. 2228 of February 22, 1995. Annex 28 to petitioners’ submission received on December 9, 2005 and Annex 16 to State’s submission received on April 10, 2006.

⁹⁸ **Annex 44.** Autopsy report on the body of Gilberto Jiménez Hernández performed by the forensic medical examiner of the PGJ [Office of the Attorney General of the State of Chiapas] on February 21, 1995. Annex 13 to petitioners’ submission received on December 9, 2005 and Annex 12 to State’s submission received on April 10, 2006.

⁹⁹ **Annex 14.** Sworn statement given by Elena Gómez Entzín (wife) on August 16, 1995 and sworn statement given by Manuel Jiménez Gómez (son) on January 9, 1996 to the Office of the Public Prosecutor. Annexes 3 and 4 of petitioners’ submission received on December 9, 2005. **Annex 45.** Certificate of delivery of body issued by the agent of the Public Prosecutor and José Jiménez Hernández on February 21, 1995 at 11:45 AM. Annex 15 to petitioners’ submission received on December 9, 2005.

¹⁰⁰ **Annex 46.** Official letter No. 277 of February 21, 1995 issued by the agent of the Federal Public Prosecutor’s Office in charge of preliminary investigation 66/1/95 requesting appointment of an expert translator. Documents received by IACHR on January 16, 2007.

¹⁰¹ **Annex 26.** Statement given by Ramiro Alfonso Hernández to the Public Prosecutor on February 21, 1995. Annex 6 to petitioners’ submission received on December 9, 2005 and Annex 7 to State’s submission received on April 10, 2006. **Annex 22.** Statement given by Sebastián Mena López to Public Prosecutor on February 21, 1995. Annex 7 to petitioners’ submission received on December 9, 2005 and Annex 3 to State’s submission received on April 10, 2006. **Annex 25.** Statement given by Manuel Jiménez Gómez to Public Prosecutor on February 21, 1995. Annex 24 to petitioners’ submission received on December 9, 2005 and Annex 8 to State’s submission received on December 9, 2005.

90. On February 22, 1995, the three detainees were released by the agent of the Public Prosecutor's Office in charge of the investigation. According to the decision to release issued on that date, they were released because "the minimum requirements were not met under Article 16 of the Constitution to bring criminal charges," in view of the fact that "the involvement of each one of them in [the EZLN] was insignificant, inasmuch as they did not hold any position and their duty was only as backpack carriers of other members, that they never wore the distinctive uniform nor did they cover their face with bandanas or balaclavas."¹⁰²

91. According to said record of release, the items seized "belong to the [EZLN] leaders, which they carried to that location to guard them for them." It further notes that "the guns that were seized as well as the rounds of ammunition and other items were located on the top of a mountain and that these things were left by persons who when they noticed the presence of the Mexican Army opted to flee to the other mountains, and it was not possible to detain them."¹⁰³

92. This record also notes that, until February 22, 1995, the following investigative measures were taken within preliminary investigation 66/I/95: (i) statements before the prosecutor's office from the three detained individuals, (ii) prosecutor's certificate of the firearms, rounds of ammunition, radios and other items made available [from the crime scene], (iii) prosecutor's statement of the members of the Mexican Army who took part in the arrest, and (iv) sodium rhodizonate, Walker gunpowder residue tests results and the autopsy report on Mr. Jiménez.¹⁰⁴ On February 23, 1995, the agent of the Public Prosecutor's Office in charge of the investigation transferred the investigation to the agent of the Federal Prosecutor's Office of the First Table of Preliminary Investigations.¹⁰⁵

Preliminary Investigation ADFTA/01/95-E before the Military Prosecutor's Office

93. On February 24, 1995, the Office of the Attorney General of Military Justice ordered the Military Prosecutor's Office assigned to the Rear Echelon of the "DURAN" Group of the "ARCOIRIS" Task Force to open a preliminary investigation.¹⁰⁶ On March 8, 1995, preliminary investigation ADFTA/01/95-E was opened into "the events [in which] Gilberto Jiménez Hernández was killed and three civilians detained," as established in Article 18 of the Code of Military Justice.¹⁰⁷ On March 10, 1995, the Secretariat of National Defense forwarded certified copies of case file 66/I/95¹⁰⁸. On March 13, 1995, SEDENA issued a note approving the opening of the preliminary investigation.¹⁰⁹

¹⁰² **Annex 47.** Release record issued by the agent of the Public Prosecutor's Office on February 22, 1995. Annex 17 to petitioners' submission received on December 9, 2005.

¹⁰³ **Annex 47.** Release record issued by the agent of the Public Prosecutor's Office on February 22, 1995. Annex 17 to petitioners' submission received on December 9, 2005.

¹⁰⁴ **Annex 47.** Release record issued by the agent of the Public Prosecutor's Office on February 22, 1995. Annex 17 to petitioners' submission received on December 9, 2005.

¹⁰⁵ **Annex 48.** Unnumbered official letter dated February 23, 1995, transferring preliminary investigation 66/I/95 to the First Table of Preliminary Investigations of the Federal Ministry of Public Prosecution. Annex 32 to petitioners' submission received on December 9, 2005.

¹⁰⁶ **Annex 49.** Telegram dated February 24, 1995, ordering the Military Prosecutor's Office to open a preliminary investigation into the death of Gilberto Jiménez Hernández. Annex 34 to petitioners' submission received on December 9, 2005.

¹⁰⁷ **Annex 50.** Radiogram. Altamirano (XJ-0351) issued by Cap. 2º. Aux. J.M. Lic. Ramírez Espindola. A.M.P.M.E. Documents received by the IACHR on January 16, 2007.

¹⁰⁸ **Annex 51.** Official letter of February 24, 1995 whereby Lieutenant Coronel of the Military Justice system, Lic. Luis García Arévalo, requests certified copies of the case file of preliminary investigation 66/I/95 from the Deputy Prosecuting Attorney of the PGR and Official letter 62/95 of February 25, 1995, whereby the requested copies are forwarded. Annexes 35 and 36 of petitioners' submissions received on December 9, 2005. **Annex 52.** Message from the National Secretary of Defense of March 10, 1995 certifying transfer of preliminary investigation 66/I/95. Documents received by the IACHR on January 16, 2007.

¹⁰⁹ **Annex 53.** Message from the National Secretary of Defense of March 13, 1995 approving the launching of the preliminary investigation. Documents received by the IACHR on January 16, 2007.

94. As for the steps taken within the investigation, on April 2, 1995, statements were taken from the Second Captain of the Infantry, who was in charge of the squadron, Gerardo Serna Melchor; Corporal of the Infantry Pablo de la Cruz Pérez, and privates Abner García Torres, Limber Salvador Chable and Manuel Hermida Rodríguez.¹¹⁰ There is no further information about other steps taken in the investigation in the case file of the IACH.

95. On July 30, 1995, the Investigator of the Military Prosecutor's Office requested the preliminary investigation to be closed, in view of the fact that private Abner García:

In performance of his duty in the Military Service, that is, in legitimate performance of authority and of the job it represents to be a member of the legally constituted Mexican Army, after telling the civilian law-breaker to halt [referring to Gilberto Jiménez Hernández], who while knowing his situation fled along with his fellow community members, but turned around only to shoot at military personnel, compelling him to shoot back to fend off the action.¹¹¹

96. Based on the foregoing, he found that the mitigating circumstances set forth in Article 119, Subsection IV of the Code of Military Justice were applicable and requested that the investigation be closed. This decision was upheld on February 1, 1996 by the Chief Prosecuting Attorney Brigadier General over the investigator of the Military Prosecutor's Office assigned to the "Oropeza" Group, on the grounds of the opinion handed down by the Third and Fifth Investigators Assigned to the Office of the Military Attorney General, in keeping with Article 82, subsection II of the Code of Military Justice. In the official letter dated February 1, 1996, the Chief Prosecutor Brigadier General writes:

[...] while it is true that within the instant investigation the offense of VIOLENCE AGAINST PERSONS CAUSING HOMICIDE was fully proven in all of its elements, as described in Article 330 of the Code of Military Justice in connection with Article 302 of the Criminal Code for the Federal District of Mexico City Local Jurisdiction [...] as for probable responsibility of the Citizen, Private of the First Infantry ABNER GARCÍA TORRES, for committing the aforementioned criminal offense, it is extinguished inasmuch as the mitigating circumstance is applicable [sic] under subsection II of Article 119 of the Code of Military Justice being that [...] it was fully and irrefutably proven that the day of the events, Private GARCIA TORRES acted in self defense, fending off a present, violent, unwarranted assault, which posed an imminent danger of even losing his life and therefore the preliminary investigation is closed on the merits.¹¹²

97. Based on available information, the family members of the alleged victim learned of the existence of this preliminary investigation on January 15, 1997 through the State's reply to the petition lodged with the IACHR on January 9, 1996. Consequently, the legal representative of José Jiménez Hernández, the alleged victim's brother, went to the headquarters of the "ARCO IRIS" Task Force to request certified copies of the military preliminary investigation file, and the request was not received given that "the

¹¹⁰ **Annex 31.** Statements given to the Military Prosecutor's Office on April 25, 1995 by Second Captain of the Infantry Gerardo Serna Melchor, Corporal of the Infantry Pablo de la Cruz Pérez, and privates Abner García Torres, Limber Salvador Chable and Manuel Hermida Rodríguez. Annex 39 of petitioners' submissions received on December 9, 2005 and Annex 22 to State's submission received on April 10, 2006.

¹¹¹ **Annex 54.** Justification report issued by the Special Military Prosecutor's Office assigned to the "Oropeza" Group dated July 30, 1995. Annex 41 to petitioners' submission received on December 9, 2005.

¹¹² **Annex 55.** Official letter AA-61036/2-3 written by the Chief Prosecutor Brigadier General to the Investigating Agent of the Special Military Office of the Public Prosecutor assigned to the "Oropeza" Group, dated February 1, 1996, closing preliminary investigation ADFTA/01/95-E. Annex 41 to petitioners' submission received on December 9, 2005.

appropriate officer was not at that location.” Notwithstanding, when he asked for the location of said officer and “he was denied the information with the argument that nobody knew where he was.” Subsequently, because of the foregoing, the legal representative of Jose Jiménez Hernández wrote a letter to the Attorney General of Military Justice requesting certified copies of the aforementioned preliminary investigation file.¹¹³

Preliminary investigation 096/89/995 before the State and Federal Offices of the Public Prosecutor

98. On July 7, 1995, José Jiménez Hernández, the brother of the alleged victim, lodged a complaint, dated June 27, 1995, with the Office of the Public Prosecutor Local Jurisdiction in Altamirano, Chiapas. The complaint was filed against those people or person who prove to be responsible for the homicide against my brother who in life answered to the name of GILBERTO JIMÉNEZ HERNÁNDEZ.¹¹⁴ Said complaint gave rise to the opening of the preliminary investigation, which was assigned the identification number 096/89/995.

99. On the same date, July 7, 1995, a motion was filed by José Jiménez to join in the investigation with the Office of the Public Prosecutor, in keeping with Article 9 of the Code of Criminal Procedure.¹¹⁵ On July 7, 1995 José Jiménez reiterated the complaint and on August 17, 1995, he reiterated the complaint again.¹¹⁶ Additionally, it appears in the case file before the IACHR that on August 16, 1995, September 16, 1995 and January 9, 1996, statements were taken from two family members of Gilberto Jiménez, his wife and his son Manuel Jiménez Gómez.¹¹⁷

100. On March 20, 1996 Official letter No. 035/96 was issued, whereby the investigating agent of the Public Prosecutor’s Office of the Alvaro Obregon Judicial District requested the transfer of certified copies of the autopsy report contained in case file to the Deputy of the PRG in Tuxtla Gutiérrez, Chiapas.¹¹⁸

101. On August 27, 1996 the investigating agent of the State Prosecutor’s Office in Altamirano forwarded the case file to the Federal Office of Public Prosecution in Comitán de Domínguez, Chiapas, in keeping with Article 53 Fraction XI subparagraph 2 of the Political Constitution of the United Mexican States and Article 50 of the Organic Law of the Federal Judiciary.¹¹⁹ As claimed by the petitioners and undisputed by the State, in learning the status of the preliminary investigation, they were informed by the National Human Rights Commission that the case file went missing from that office as a result of a flood in 1997.¹²⁰

¹¹³ **Annex 56.** Petitioners’ request for certified copies of the military preliminary investigation file during the hearing held on October 6, 1997.

¹¹⁴ **Annex 57.** Complaint dated June 27, 1995, received on July 7, 1995, filed by José Jiménez Hernández. Annex 43 to petitioners’ submission received on December 9, 2005.

¹¹⁵ **Annex 58.** Motion to recognize victim assistance to investigating agent, filed with the Office of the Public Prosecutor of Altamirano, Chiapas, on July 7, 1995. Annex 2 to the documents submitted by the petitioners during the hearing held on October 6, 1997.

¹¹⁶ **Annex 59.** Statement given by Mr. José Jiménez Hernández to the Investigating Agent of the Office of the Public Prosecutor of Altamirano of July 7, 1995 and August 17, 1995. Annex 44 to petitioners’ submission received on December 9, 2005.

¹¹⁷ **Annex 14.** Sworn statement given by Elena Gómez Entzín (wife) on August 16, 1995 and sworn statement given by Manuel Jiménez Gómez (son) on January 9, 1996 to Office of Public Prosecutor. Annexes 3 and 4 to petitioners’ submission received on December 9, 2005.

¹¹⁸ **Annex 60.** Official letter 035/96 of March 20, 1996 whereby the Office of the Public Prosecutor of the Judicial District of Alvaro Obregón requests certified copies of case file 66/1/95 from the PGR in Tuxtla Gutiérrez. Annex 46 to petitioners’ submission received on December 9, 2005.

¹¹⁹ **Annex 61.** Official letter 662/996 transferring preliminary investigation 096/89/995 to the Federal Prosecutor’s Office, received on August 28, 1996. Annex 45 to petitioners’ submission received on December 9, 2005.

¹²⁰ Petitioners’ submission dated November 30, 2005, received by the IACHR on the same date.

Other domestic proceedings

102. The information available to the IACHR indicates that a complaint was lodged with the National Human Rights Commission (CNDH).¹²¹ In a note received on September 15, 1997, the Fray Bartolome de las Casas Human Rights Center requested information from the CNDH regarding the “current status of the investigation and case file pertaining to the case in which the Tzeltal indigenous peasant farmer Gilberto Jiménez Hernández had lost his life.”¹²² The situation of the aforementioned complaint was not reported to the IACHR, nor the reply provided by the CNDH.

103. Additionally, based on the available information, other complaints were filed regarding the events of the case, which were assigned the case numbers CNDH/122/95/ALTA/20.032 and CNDH/122/95/ALTA/S00020.034.”¹²³

B. Legal Analysis

104. The Commission notes that the principal dispute in this case pertains to the circumstances surrounding the death of Mr. Gilberto Jiménez Hernández. It is not disputed that the death of the alleged victim was caused by gunshots fired by Abner García Torres, a Mexican Army private. The dispute is that, while the Mexican State has deemed that the killing was in legitimate self-defense of the Army private, based on the findings of the investigation in the military criminal jurisdiction, the petitioners contend that it was the result of excessive use of force by the State’s agent in the context of a military counterinsurgent operation, with several pieces of evidence proving a violation of the right to life, which were not disproven by means of the investigation.

105. In this regard, the Commission recalls that international human rights protection should not be confused with criminal justice. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to determine whether the State concerned fulfilled its international obligations and, in the event that it has not, to come to the aid of the victims and provide for reparation of any damages that may have been caused as a result of conduct that can be attributed to the State.¹²⁴ Accordingly, the Commission makes clear as a preliminary point that it is not its job to determine whether the military agents are criminally responsible for the death of Mr. Jiménez Hernández, but rather to assess, based on available information and pursuant to the obligations stemming from the American Convention and the applicable rules of the burden of proof, whether the actions of said agents entailed international responsibility of the State.

¹²¹ **Annex 19.** Report of the Indigenous Delegation of Pueblo Por la Paz to *ejidos* Emiliano Zapata and La Grandeza of April 23, 1995. Annex 5 to petitioners’ submission received on December 9, 2005.

¹²² **Annex 61.** Frayba’s letter to the Altos and Selva de Chiapas Coordinators of the National Human Rights Commission, of September 15, 1995. Annex 47 to petitioners’ submission received on December 9, 2005.

¹²³ **Annex 55.** Official letter AA-61036/2-3 written by Chief Prosecutor Brigadier General to the investigating agent of the Special Military Prosecutor’s Office assigned to the Oropeza Group, dated February 1, 1996, advising of the closing of preliminary investigation ADFTA/01/95-E. Annex 41 to petitioners’ submission received on December 9, 2005.

¹²⁴ IA Court of HR. *Case of Velásquez Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, par.134.

1. Right to life and the principle of equal treatment and non-discrimination (Article 4 of the American Convention in connection with Articles 1.1 and 2 of the same instrument)

106. Article 4.1 of the Convention establishes that:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

107. Article 24 of the Convention provides that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

108. Article 1.1 of the Convention establishes that:

The 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.

109. Article 2 of the Convention provides that:

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.

110. The Commission shall first examine the State's actions in the context of the planning and deployment of the operation carried out at ejido La Grandeza, in which Mr. Jiménez Hernández was killed. The Commission shall first determine whether the State met applicable standards of international law in implementing the operation, as it relates to the death of Mr. Jiménez Hernández.¹²⁵

i) Planning and regulating the potential use of force in the operation

111. The right to life is prerequisite to the enjoyment of all other human rights and without respect for which all other rights are rendered meaningless.¹²⁶ As the Inter-American Court of Human Rights has held, compliance with the duties imposed by Article 4 of the American Convention, in conjunction with Article 1(1) thereof, does not only presuppose that no person can be arbitrarily deprived of his life (negative duty) but also requires, pursuant to its obligation to guarantee the full and free exercise of human rights, that the States adopt any and all necessary measures to protect and preserve the right to life (positive duty) of the individuals under their jurisdiction.¹²⁷

¹²⁵ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic. Merits Reparations and Costs.* Judgment October 24, 2012 Series C No. 251; and IA Court of HR. *Case of the Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment August 27, 2014. Series C No. 281.

¹²⁶ IA Court of HR. *Case of the "Street Children" (Villagrán Morales et al) v. Guatemala.* Merits. Judgment November 19, 1999. Series C No. 63, par. 144.

¹²⁷ IA Court of HR. *Case of Zambrano Vélez et al v. Ecuador.* Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 80; *Case of the "Street Children" (Villagrán Morales et al) v. Guatemala.* Merits. Judgment November 19, 1999. Series C No. 63, par. 144.

112. The European Court has highlighted how essential it is for the right to life to be interpreted and enforced so that its guarantees are truly practical and effective.¹²⁸ Along these lines of thinking, even in the context of State operations in which a legitimate goal is pursued, under international law, several requirements linked to rights protected by the Convention, including the right to life, must be met.

113. In this regard, in instances of State operations in which the “use of force,” which may lead to deprivation of life as an unintended consequence, would be permitted in principle,¹²⁹ States must adopt the necessary measures to create an adequate legal framework that deters any possible threat to this right.¹³⁰ The Inter-American Court has held that it is a duty of States to adopt their domestic laws and to “see that their security forces, which are entitled to use legitimate force, respect the right to life of the people under their jurisdiction.”¹³¹

114. The Inter-American Court has held that the following obligations emanate from this duty: i) the State must be “clear when defining domestic policies on the use of force and pursue strategies to implement the *Principles on the Use of Force and the Code of Conduct*,” ii) the State must provide agents with different types of weapons, ammunition, and protective equipment that enable them to adapt the elements used in their reaction proportionately to the incidents in which they have to intervene, restricting the use of lethal weapons that can cause injury or death as much as possible;¹³² and iii) the State must train its agents to become familiar with the provisions of the law, which enable them to use firearms and instruct them adequately enough so that, in the event that they must decide whether or not to use it, they are able to do so.¹³³

115. The Inter-American Court has written that when an authority is deployed in response to an incident, “State agents, insofar as possible, should assess the situation and draw up a plan of action before intervening.”¹³⁴ Regarding this same obligation, the European Court has noted that the acts of State’s agents in an “irregular and arbitrary manner is incompatible with effective respect for human rights.” In the words of the European Court:

[...] in keeping with the importance of Article 2 [right to life] in a democratic society, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination [...] (free translation).¹³⁵

¹²⁸ ECHR, *Case McCann and others v. The United Kingdom*. Application No. 27229/95, 27 September 1995, § 146. Also see IA Court of HR, *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 79.

¹²⁹ ECHR, *Case McCann and others v. The United Kingdom*. Application No. 27229/95, 27 September 1995, § 148.

¹³⁰ IA Court of HR. *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 81; IA Court of HR. *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Judgment July 5, 2006. Series C No. 150, par. 66.

¹³¹ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic. Merits, Reparations and Costs*. Judgment October 24, 2012 Series C No. 251. Fr. *Case of Montero Aranguren et al, (Detention Center of Catia) v. Venezuela*. Merits, Reparations and Costs. Judgment 5, 2006. Series C No. 150, par. 66.

¹³² IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic. Merits, Reparations and Costs*. Judgment October 24, 2012 Series C No. 251. par. 80.

¹³³ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic. Merits, Reparations and Costs*. Judgment October 24, 2012 Series C No. 251. par. 84.

¹³⁴ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic. Merits, Reparations and Costs*. Judgment October 24, 2012 Series C No. 251. par. 81.

¹³⁵ ECHR, *Case Makaratzis v. Greece*. Application No. 50385/99/95, 20 December 2004, § 59.

116. In the matter under examination, the Commission notes, firstly, as it has recognized in the past, that the restoring of domestic order vis-à-vis illegal actions of a subversive group is a legitimate aim. In particular, the Commission has recognized regarding counterinsurgent efforts in Mexico against the EZLN that “the Mexican State has the duty and the authority to protect itself against violent actions and to take military actions against dissident armed groups.”¹³⁶

117. In the instant case, the Commission notes that the concrete events preceding the death of Mr. Jiménez Hernández arose in the context of a military operation about which the State noted, in a general way, that members of the Mexican Army were conducting a surveillance run in the area around *ejido* La Grandeza community. Notwithstanding, as was established by the IACHR under proven facts, the available information indicates that a number of military agents intruded onto and took over an indigenous community of 350 persons, mostly women and children, which triggered a mass flight of people seeking refuge elsewhere.

118. The Commission recalls that said operation in La Grandeza took place as part of the implementation of the “Chiapas 94 Campaign Plan,” which was the basis for the Mexican Army’s counterinsurgency actions at the time of the events. The Commission notes that said Plan did not constitute an adequate legal framework to deter possible threats to the right to life, but on the contrary provided guidelines, with the objective of “breaking the relationship of support [...] between the population and the law breakers,” to attack the segments of the population regarded as “enemy forces,” among which were expressly included “ethnic and peasant” [...] organizations. Likewise, the Plan did not instruct Army members to respect the fundamental principles of distinction, necessity and proportionality, but on the contrary to indiscriminately target segments of the civilian population. Thus, beginning with the very design of the plan, the grounds were set to use excessive force, endanger the civilian population or individuals, who at that particular point in time, were not taking part in the hostilities. Additionally, the grounds were set for said abuses to be committed with a bias, clearly discriminating against the ethnic origin of certain groups. In fact, as was described in the proven facts section, the available information indicates that it has been documented at both the national and international level that gross human rights violations were committed in implementing said document.

119. Moreover, the State did not provide any information about the existence of any operational supervisory or oversight protocols under which the use of force could be valid, nor about any training provided on the “use of force” to the members of the military forces involved. There are no references either to any items of this nature in the files of the domestic investigations.

120. Therefore, based on the available information, the Commission concludes that in the context of the operation in which Mr. Jiménez Hernández was killed, not only was there no minimal plan of operations in place or any regulations of these aspects, which pursuant to the legal precedents of the Inter-American Court, are essential to the use of lethal force, but on the contrary there was an official plan in place that made conditions ripe for arbitrary and discriminatory actions of the security forces with a view toward accomplishing the intended purpose.

121. This situation, in and of itself, is incompatible with the duty to ensure the right to life as established in Articles 4.1 and 24 of the American Convention in conjunction with the obligations set forth in Articles 1.1 and 2 thereof.

ii) Deployment of the military operation in La Grandeza ejido and the use of force

122. On this issue, the Commission will specifically examine the use of force in the context of the military operation that led to the death of Mr. Jiménez Hernández. Based on the available information, the Commission notes that there are discrepancies between the accounts of the military members who

¹³⁶ IACHR. Report N° 48/97. Case 11.411. Severiano and Hermelindo Santiz Gómez "Ejido Morelia". Mexico. February 18, 1998. par. 42-43.

participated in the operation and the other people who witnessed it, as to the way the operation unfolded. In particular, the Commission has noticed that no reference is made by the Army members in their statements to how they located the site where those who left the ejido were hiding and have thereby failed to provide highly consequential information regarding the circumstances in which the events played out. Based on the statements of the members of the military, “voices in dialect were overheard.” When they approached, they observed “a group of civilians around another one who was speaking by radio” and they stated that “we could see that some of them were carrying long barrel weapons in their hands.” According to this version of the facts, the military agents then told them to stop, in response to which “the civilians [...] ran down hill on the opposite side of the mountain.” After stating that, Captain Gerardo Serna Melchor claims he “fired three warning shots in the air.”

123. At the same time, based on the testimony of members of the military force, Abner García Torres was part of the squadron made up of another three troops, which had also made its way up to the top of the same mountain, where the group of La Grandeza community members were hiding out. According to the statement of the members of this squadron, Army private García Torres heard “the murmuring of voices in dialect and then caught up with his three fellow soldiers about three steps ahead” and observed a person speaking by radio “without understanding what he was saying because he was communicating in dialect.” According to García Torres, there were eight other people there, “some were carrying long barrel weapons and some were not carrying weapons.” When their presence was noticed, they fled down the mountainside and, consequently, he told them to stop shouting to them “halt stop.” The soldiers testified that, upon seeing them flee, García Torres fired shots into the air and then Mr. Jiménez Hernández, who was also running down the mountainside, turned around and fired on the soldier, who consequently fired 3 or 4 more shots back at him [Mr. Jiménez] to fend off the attack.

124. With regard to this official version, the Commission deems it appropriate to note that the testimony of the military troops involved cannot be assessed in isolation but must be assessed in conjunction with all of the evidence appearing in the case file and in light of the rules on burden of proof in international human rights law and, specifically, in instances of alleged arbitrary use of lethal force.

125. Accordingly, an examination of the rest of the available evidence regarding the facts brings to the attention of the Commission that the military members’ version as to the circumstances in which the operation was deployed is inconsistent with several pieces of testimonial and documentary evidence mentioned in the previous section of this report. This evidence, viewed as a whole, indicates that: i) a group of persons wearing civilian attire, among whom women and children were included, was fleeing from the Army out of fear, based on the context of human rights violations committed in other communities; ii) military agents intimidated and beat Sebastián Mena López, a community member, at least “three times” in order to get him to tell them the location of the hiding place of the other people; and iii) when they arrived in the location, an announcement was made by the military agents about the intent to cause harm to the persons that were hiding in the mountain while firing several shots.

126. Additionally, the Commission notes that the shooters justified the shots they fired because they said that they heard a group of persons, who were speaking in “dialect,” among whom they saw some were carrying “weapons” and others were not. The Commission underscores that the fact that they were speaking in an indigenous language cannot be regarded as a circumstance proving the existence of danger and justifying the use of force; instead, it reveals a discriminatory criterion of ascribing dangerousness based on ethnic origin, which was consistent with the content of the framework regulating the actions of the Army in its counterinsurgency campaign in Chiapas. Based on the information available to the IACHR, it was determined subsequently that even though there were persons, who had joined the EZLN or had collaborated to a certain extent with the organization, at the time when the members of the Army used force against them, it was simply a group of persons wearing civilian attire, mostly children, women and elderly persons, who were fleeing from the Army out of their fear. The mere reference to some of them carrying weapons does not meet the standard to satisfactorily explain and justify the use of force as it pertains to necessity and proportionality in the specific circumstances in which the events unfolded. Moreover, the army members’ own statements indicate that their shots were meant to keep them from “escaping” or “fleeing.” Additionally,

the Commission cannot ignore the context of human rights violations that were committed in other communities of the area at the time of the events, as described in the proven facts section.

127. In view of the foregoing points, the Commission finds that, because a regulatory framework was in place of excessive and arbitrary use of force in operations conducted in the context of the countersubversive campaign, the facts described above constitute evidence that the military agents unnecessarily and disproportionately exerted force over different points in time during which the operation was taking place. As will be determined hereunder in the section on the rights to a fair trial and judicial protection, this evidence was not refuted through an investigation that is compatible with the American Convention.

iii) Examination of the use of force against Mr. Jiménez Hernández

128. On this issue, the Commission will examine available information regarding the specific fact of the use of lethal force by Army private García Torres against Mr. Jiménez Hernández. For this purpose, the Commission will analyze whether or not the State was able to prove need and proportionality of the use of force in the concrete case by way of a satisfactory explanation in keeping with the American Convention.

129. The Commission recalls that in instances of the use of lethal force by State's agents, the burden falls upon the State to prove that it attempted to use less lethal means of intervention, which were unsuccessful, and that the actions of its security forces were necessary and proportional in relation to the exigencies of the situation, particularly, vis-à-vis the threat that was posed.¹³⁷ Specifically, the Court has held that force "must be used in keeping with the principles of legality, absolute necessity, and proportionality."¹³⁸

130. The Commission notes that the *UN Basic Principles on the Use of Force and Firearms* make it possible to use firearms "to arrest a person presenting such a danger and resisting authority."¹³⁹ Nonetheless, as part of the requirements to be able to use force in said hypothetical situation, the *Principles* further establish that i) force may only be used in the event that other less extreme means are insufficient to achieve these objectives; ii) intentional lethal use of firearms may only be used "when strictly unavoidable in order to protect life;" iii) law enforcement officials shall give "a clear warning of their intent to use firearms;" and iv) said warning must be given with sufficient time for it to be observed, unless to do so would unduly place the law enforcement officials or other persons in harm's way.

131. Pursuant to the legal precedents of the Inter-American and European Courts, necessity and proportionality in the use of force must be proven in light of the particular circumstances of the specific case. Likewise, the Commission recalls that State's agents who are involved in an operation of this nature must use the criteria of "differential and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required."¹⁴⁰

132. The Mexican State argued before the IACHR that the death of Mr. Jiménez Hernández came about as a result of a confrontation between EZLN and Mexican Army members. While said position concurs with the version given by agents of the Federal Army, the Commission notices that the factual evidence exposes some inconsistencies as to the hypothesis of legitimate self-defense.

¹³⁷ IA Court of HR. *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 108.

¹³⁸ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic*. Merits Reparation and Costs. Judgment October 24, 2012 Series C No. 251, par. 85.

¹³⁹Principles 9 and 10 of the *United Nations Basic Principles on the Use of Force and Firearms* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) August 27 to September 7, 1990.

¹⁴⁰ IA Court of HR. *Case of Nadege Dorzema et al v. Dominican Republic*. Merits Reparation and Costs. Judgment October 24, 2012 Series C No. 251, par 85 ii).

133. Firstly, the Commission notes that none of the civilian witnesses, who made a statement to public authorities, testified that Gilberto Jiménez Hernández had been armed at the time of the events or had fired on the Army troops. On the contrary, there is testimonial evidence indicating he did not have a gun and that he was located, at least, 4 meters away from the weapons seized in the operation. According to the report submitted by Captain Serna Melchor the same day as the events, it was necessary to “inspect” the area to find the two confiscated rifles. Additionally, none of the certificates or reports issued by State authorities mention that the alleged victim had any weapon at the time he perished.

134. Furthermore, based on several testimonies and documents that were available to the IACHR as cited above, Mr. Jiménez Hernández was carrying one of his daughters tied to his back with a shawl. This fact makes it less plausible that the alleged victim was carrying a weapon at the time of the events and fired on members of the Army, placing both his own and his daughter’s lives in jeopardy. Moreover, information provided to the IACHR reveals that, at the time he fled down the mountainside, he was holding one of his other children by the hand. Also, based on the findings of proven fact, in addition to the wound on his face that is claimed to have taken his life, the alleged victim had a firearm projectile perforation in his back, which could indicate that he was fleeing down the mountainside as were the rest of the people, who were hiding out in the mountain, when he was hit by the bullet.

135. In addition, the Commission deems that the ballistic and expert chemist’s test results make it impossible to conclude unequivocally that Mr. Jiménez Hernández indeed shot a weapon at private García Torres just prior to his death. As has been noted above, while the version that he fired a shot at that time is supported solely on armed forces members’ own statements, there is circumstantial evidence described earlier, which at least undermines the credibility of said version. As an additional piece of evidence, the Commission cannot ignore that, regarding this operation, there have been denials and contradictions between members of the Mexican Army regarding their actions at the time of the events, including an official denial of any military presence at all on *ejido* La Grandeza.

136. We can also add to the foregoing findings, as has been mentioned earlier, that the case was investigated by the Federal, the State and the Military Offices of the Public Prosecutor. The only jurisdiction of the three to find that the death of Mr. Gilberto Jiménez Hernández resulted from the reaction of private García Torres to fend off an attack was the Military Public Prosecutor’s Office. This office, as will be explained hereunder, does not meet the requirements of independence and impartiality, as established under the American Convention, for the clarification and punishment of crimes such as those of the instant case. Consequently, gathering evidence without minimal guarantees of independence and impartiality under the military jurisdiction, which in and of itself is at odds with the Convention, cannot constitute strict compliance with the principles of necessity and proportionality in the use of lethal force in an actual case.

iv) Conclusion on responsibility of the Mexican State for the death of the alleged victim

137. The Inter-American Court has held that when a person dies a violent death in circumstances where State’s agents may have been involved, the State should give a satisfactory and convincing explanation of the events and rebut the allegations related to its liability, by means of adequate evidence.¹⁴¹ As established by the Court, “in proceedings on human rights violations, the State’s defense cannot rest on the impossibility of the plaintiff to produce evidence which, in many cases, cannot be obtained without the State’s cooperation.¹⁴² Therefore, when there are indications pointing to the involvement of State agents, the State

¹⁴¹ IA Court of HR. *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment July 5, 2006. Series C No. 150, par. 80. Similarly, also see *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment June 7, 2003. Series C No. 99, par. 111.

¹⁴² IA Court of HR. *Case of the Gómez Paquiyauri Brothers*. Judgment July 8, 2004. Series C No. 110, par. 154, and *Case of Maritza Urrutia*. Judgment November 27, 2003. Series C No. 103, par. 128.

must adopt all necessary measures to determine the appropriate individual responsibility.¹⁴³ Using said criteria, in the absence of a diligent investigation, the Court has found that when the State has not conducted further investigations to verify that there were circumstances in which a potential human rights violation took place, said situation can be attributable to the State and cannot be used to disprove the violations charged by the victims.¹⁴⁴

138. Based on the foregoing, in cases where the investigation constitutes a violation of the minimal fair trial guarantees as established by the American Convention, the failure to elucidate the events in a diligent and effective manner and, consequently, the lack of a satisfactory and convincing explanation of events, can be a factor to consider in order to assess the alleged infringement and the consequent international responsibility.¹⁴⁵ As the Court has observed, reaching another conclusion would mean allowing the State to shield itself behind the negligence and ineffectiveness and partiality of the investigation in order to tolerate leaving the truth uncovered and shirk its own responsibility.¹⁴⁶

139. In the instant case, as will be examined in subsequent sections, the investigations opened in the domestic jurisdiction did not meet the minimal requirements of independence and impartiality, or the standard of due diligence and reasonable period of time. This means that the fact that it is impossible today to properly and effectively establish what transpired is attributable to the State.

140. Accordingly, the determination of international responsibility by the Commission must be based on the information available to it and take into account *indicia* and circumstantial evidence in the absence of a proper clarification of the facts conducted by the State.

141. The Commission is able to identify both general and specific *indicia* and evidence for this purpose.

142. As to the general items, based on everything examined thus far, the actions performed by the military agents: i) took place within a legal framework that was conducive to arbitrary and discriminatory conduct with excessive use of force in the antiterrorist campaign, and in the absence of specific regulations and control over security agents regarding criteria for use and modulation of force; ii) the group of persons were wearing civilian attire, mostly women and children, who stated they were fleeing from the Army out of fear in the context of human rights violations committed in other communities; iii) in the context of the specific operation, military agents intimidated and beat a community member at least “three times” to get him to tell them the location of the hiding place of the other persons; and iv) there is information indicating that, when they arrived in the location, military agents announced their intention to cause harm to the persons hiding out in the mountain while firing several shots. In addition to these general items of *indicia*, we have the inconsistency explained above between the statements about whether Mr. Jiménez Hernández was armed and whether he fired a shot just before he was killed.

143. In light of the State’s failure to properly investigate and with several indications pointing to excessive use of force in the context of the operation, the State was unable to prove by means of a satisfactory and convincing explanation, in keeping with the American Convention, necessity and proportionality of the use of force against Mr. Jiménez Hernández in firing several unquestionably lethal shots at him.

¹⁴³ IA Court of HR. *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment April 3, 2009 Series C No. 196, par. 97.

¹⁴⁴ IA Court of HR. *Case of J. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 27, 2013. Series C No. 275, par. 334.

¹⁴⁵ IA Court of HR. *Case of J. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 27, 2013. Series C No. 275, par. 353.

¹⁴⁶Also see: IA Court of HR. *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment April 3, 2009 Series C No. 196, par. 9; IA Court of HR. *Case of J. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 27, 2013. Series C No. 275, par. 356.

144. All of these elements taken as a whole enable the Commission to draw the conclusion that the Mexican State is responsible for violation of the right to life, as established in Article 4.1 of the American Convention in conjunction with Article 1.1 thereof, to the detriment of Mr. Gilberto Jiménez Hernández. The Commission also finds that because it took place within the framework of a State Plan with a clearly discriminatory overtone as to ethnic origin of the persons, in light of the State's failure to provide a satisfactory and convincing explanation, Mr. Jiménez Hernández's death can also be considered in said context a violation of Article 24 of the American Convention.

2. The right to a fair trial and judicial protection with regards to the investigations opened by the prosecutor's offices into the death of Gilberto Jiménez Hernández

145. In cases of violent death, the Inter-American Court has held that Articles 8 (fair trial) and 25 (judicial protection) of the American Convention create the obligation to conduct a prompt, serious, impartial and effective ex officio investigation, as an essential element and requirement for the protection of rights affected in such situations.¹⁴⁷ In light of Article 1.1 of the American Convention, this duty obliges the State to provide for a simple and prompt recourse, so that, inter alia, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.¹⁴⁸ Additionally, Article 2 of the Convention requires the State to annul laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, as well as pass laws and develop practices conducive to achieving effective observance of such guarantees of the required investigation.¹⁴⁹

146. When the death may have been the consequence of the use of force, the European Court has said that "the closest scrutiny" must be exercised taking into consideration not "only the actions of agents of the State who exerted the force, but all other respective circumstances including subjects such as planning and control of the actions under examination."¹⁵⁰ Thus, "any deficiency in the investigation that undermines the ability to establish the cause of the death or the person responsible compromises compliance with this norm."¹⁵¹

147. In the instant case, the Commission notes once again that in view of the circumstance in which Mr. Jiménez Hernández lost his life, a criminal investigation was the only means whereby the events could be elucidated and it could be determined or excluded that he was killed in legitimate self-defense of a military agent in the context of a confrontation. Consequently, it was the duty of the State to conduct an independent, impartial, diligent and effective investigation within a reasonable period of time.

148. The Commission will examine compliance with State obligations in the following order: i) independence and impartiality of the military authorities who conducted the investigation; ii) due diligence in the investigations; and iii) reasonableness in the length of time of the investigation into the events.

¹⁴⁷ : IA Court of HR. *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment April 3, 2009 Series C No. 196, par. 75.

¹⁴⁸ IA Court of HR. *Case of Loayza Tamayo. Reparations*. Judgment November 27, 1998. Series C No. 42, par. 169; IA Court of HR. *Case of Velásquez Rodríguez. Preliminary Objections*. Judgment June 26, 1987. Series C No. 1. par. 91; IA Court of HR. *Case of Fairén Garbí and Solís Corrales. Preliminary Objections*. Judgment June 26, 1987. Series C No. 2, par. 90.

¹⁴⁹ Also see: IA Court of HR. *Case of Almonacid Arellano et al.* Judgment September 26, 2006. Series C No. 154, par. 118; IA Court of HR. *Case of Ximenes Lopes v. Brazil. Preliminary Objection*. Judgment November 30, 2005. Series C No. 139, par. 83, and *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment February 5, 2001. Series C No. 73, par. 85.

¹⁵⁰ ECHR, *McCann and Others v. the United Kingdom*, Application no. No. 27229/95, September 1995 § 36.

¹⁵¹ ECHR, *Milkchalkova and others v. Ukraine*, Application no. 10919/05, 13 January 2011, § 42.

i) Independence and impartiality of the military authorities who conducted the investigation

149. Based on the allegations of the parties and the established facts, the Commission shall address hereunder: a) the legal framework regulating military jurisdiction at the time of the events; b) proceedings in the military criminal jurisdiction conducted in the instant case; and c) international responsibility for using the military jurisdiction in the investigation into the death of Mr. Jiménez Hernández.

a. Legal framework regulating military criminal jurisdiction at the time of the events

150. Conducting the investigation proceedings under military criminal jurisdiction in this case was based on Article 13 of the Political Constitution of the United Mexican States and on Article 57 of the Code of Military Justice, which read as follows:

Article 13.- Military jurisdiction subsists for crimes and offenses against military discipline.

Article 57.- Military discipline offenses are: [...] II. Common or federal offenses when committed in any of the following circumstances set forth hereunder:

a).- When they were committed by military members when in service or on the occasion of acts thereof [...] When in the circumstances of subsection II, military members and civilians are involved, the former shall be prosecuted by military justice.

151. The Commission takes note that, as a consequence of the assignment of jurisdiction set for in said provision, the provisions of the Code of Military Justice are applicable, including Article 49, subsection III, whereby the commander of the Military Patrol served as the Military Judicial Police Investigator. Moreover, the preliminary investigation opened in the military jurisdiction was based on this code of law, citing the mitigating circumstances of responsibility provided for in Article 119, subsection IV thereof.

b. Investigative proceedings under military criminal jurisdiction

152. In the instant case, jurisdiction was assigned to the military by virtue of the fact that a member of the military was allegedly responsible for the death of Mr. Jiménez Hernández.

153. Based on an examination of the case file of the investigation, the Commission notes that the essential parts of the investigation were conducted by members of the military institution during two different timeframes. The first timeframe was immediately after the death of Mr. Jiménez Hernández occurred. In this regard, (i) the actual day of the events, February 20, 1995, the commanding officer of the Military Patrol, to which the Army members belonged who conducted the incursion onto La Grandeza, wrote a report in performance of the duties of Military Judicial Police Investigator, wherein he took the statements of the Army troops present at the time of the events and of the alleged perpetrator, and drew up a list of the items seized in the area; (ii) agents of the Mexican Army removed the lifeless body of Gilberto Jiménez Hernández from the scene of the events; (iii) on February 21, 1995, at 12:00 hours, an investigating agent of the Special Military Public Prosecutor's Office certified the death, at which time he was located on *ejido* Lázaro Cárdenas, in the Municipality of Altamirano, in the State of Chiapas and not at the scene of the events; and (iv) on February 21, 1995, a medical surgeon of the Mexican Army issued the first medical certificate of the body of the alleged victim.

154. The second timeframe occurred on March 8, 1995, when preliminary investigation ADFTA/01/95-E was opened into the events that resulted in the death of Gilberto Jiménez Hernández and the detention of three civilians, after the Federal Office of the Public Prosecutor conducted some investigation under the case file number 66/1/95. Accordingly, the Military Prosecutor's Office (i) received certified copies of the file of preliminary investigation 66/1/95, which was carried out under civilian jurisdiction; and (ii) it took the statements of the Captain in charge of the squadron to which the soldier allegedly responsible for

the death belonged, as well as from another four military agents present at the time of the events, including Army private Abner García Torres.

155. Based on the foregoing, on July 30, 1995, the investigating agent of the Military Prosecutor's Office requested the preliminary investigation to be closed, inasmuch as he believed that Army private Abner García, "in legitimate performance of authority and of the job it represents to be a member of the legally constituted Mexican Army," had fired his weapon to fend off shots allegedly fired by Gilberto Jiménez Hernández, while he was fleeing from the Mexican Army along with his fellow community members in the surroundings of *ejido* La Grandeza. Based on this reasoning, the mitigating circumstance set forth in Article 119, subsection IV of the Code of Military Justice was deemed applicable and the request was made to close the investigation. Said request was granted on February 1, 1996, by the Prosecuting Brigadier General in considering that "[...] while it is true that within the instant investigation the offense of VIOLENCE AGAINST PERSONS CAUSING HOMICIDE was fully proven in all of its elements," the perpetrator's responsibility "is extinguished inasmuch as the mitigating circumstance is applicable [sic] under subsection II of Article 119 of the Code of Military Justice."

c. International responsibility of the State in applying military criminal jurisdiction

156. The Commission recalls that special jurisdictions, such as military criminal justice, must be used on a restrictive and exceptional basis and be focused on protecting special legal interests, which are specifically connected to the institution itself. Accordingly, the Inter-American Court has had the opportunity to examine the structure and make up of special tribunals, such as military courts, in light of the United Nations Basic Principles on the Independence of the Judiciary. Some relevant factors in this regard are: i) the fact that they are made up of active-duty military members who are hierarchically subordinate to higher-ranked officers through the chain of command; ii) the fact that their designation does not depend on their professional skills and qualifications to exercise judicial functions; and iii) the fact that they do not have sufficient guarantees that they will not be removed. This all leads to the conclusion that said tribunals lack independence and impartiality to hear cases of human rights violations.¹⁵²

157. In view of the preceding criteria, the Inter-American Court has discussed how the military criminal jurisdiction is incompatible with the American Convention when potential human rights violations are involved, noting that ensuring independence and impartiality is problematic in this jurisdiction due to the fact that members of armed forces themselves are "charged with prosecuting their own peers for executing civilians."¹⁵³ Similarly, regarding special jurisdictions, such as the military jurisdiction, the Inter-American Court has held that only active soldiers shall be prosecuted "for the commission of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself."¹⁵⁴

158. In the instant case, since a potential violation of the right to life is involved, which is a legal interest outside military justice, the Commission finds that applying military justice to this particular case is a violation of the right to have a competent, independent and impartial authority to obtain justice in cases of human rights violations. The Commission notes that the only definitive response provided in the domestic arena to the events was precisely from a jurisdiction whose application to the case was incompatible with the Convention and casts serious doubts on the findings of fact reached by the military justice system. The evidentiary implications of this were taken into consideration in the examination of the violation of Article 4 of the American Convention.

¹⁵² Also see: IA Court of HR. *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs, Judgment November 22, 2005, Series C, No. 135. Par. 155 and 156.

¹⁵³ IA Court of HR. *Case of Las Palmeras v. Colombia*. Merits. Judgment December 6, 2001. Series C No. 90, par. 53.

¹⁵⁴ IA Court of HR. *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 2, 2009. Series C No. 209, par. 272.

159. The Commission also notes that the application of military justice to this particular case was a consequence of the legal framework in effect at the time of the events, specifically Article 13 of the Constitution and Article 57 of the Code of Military Justice. The bodies of the Inter-American System have previously addressed incompatibility of applying the military jurisdiction established in said provision of the Code of Military Justice, with the obligations set forth in the American Convention. In particular, in the case of *Radilla Pacheco v. Mexico*, the Inter-American Court wrote that:

Article 57, fraction II, subparagraph a), of the Code of Military Justice is an ample and imprecise provision that prevents the determination of the strict connection of the crime of the ordinary jurisdiction with the military jurisdiction objectively assessed. The possibility that the military courts prosecute any soldier who is accused of an ordinary crime, for the mere fact of being in service, implies that the jurisdiction is granted due to the mere circumstance of being a soldier. In that sense, even when the crime is committed by soldiers while they are still in service or based on acts of the same, this is not enough for their knowledge to correspond to the military criminal justice.¹⁵⁵ [Translator's rendition of last sentence: *In this regard, even when the crime is committed by soldiers while they are still in service or on the occasion of acts performed in service, it is insufficient for the military criminal justice system to hear the case.*]

160. Based on the foregoing, the Court ordered “the State to adopt, within a reasonable period of time, the appropriate legislative reforms in order to make Article 57 of the Code of Military Justice compatible with the international standards of the field and of the Convention on Human Rights.”¹⁵⁶ Said order was withdrawn in three subsequent cases regarding Mexico, wherein application of military criminal jurisdiction under Article 57.II.a of the Code of Military Justice was deemed to run counter to the Convention.¹⁵⁷ In keeping with this precedent, on June 13, 2014, an amendment to said provision was published in the Official Gazette establishing that human rights violations committed against civilians cannot be heard by military justice courts.

161. Because at the time the events of this case were heard by the military courts this amendment had not been instituted, the Commission deems that the State breached its obligation to adopt domestic legislative and other measures, as provided for under Article 2 of the Convention.

162. Based on the preceding considerations, the Commission concludes that in maintaining a legal framework, which enabled the application of military justice to the instant case, the Mexican State violated the rights to a fair trial and judicial protection, specifically the right to a competent, independent and impartial authority, pursuant to Articles 8.1 and 25.1 of the American Convention in conjunction with Articles 1.1 and 2 of that instrument, to the detriment of the family members of Gilberto Jiménez Hernández.

ii) Due diligence in the investigations

a. General considerations

163. The Inter-American Court has ruled that in order to fulfill the duty to investigate the death of a person with due diligence, States are obligated to act, from the time of the first steps of the investigation,

¹⁵⁵ IA Court of HR. *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 23, 2009. Series C No. 209. par. 286.

¹⁵⁶ IA Court of HR. *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 23, 2009. Series C No. 209. Tenth Operative Paragraph and pars. 337 to 342.

¹⁵⁷ IA Court of HR. *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment August 30, 2010 Series C No. 215, par. 178 to 179, and *Case of Rosendo Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs. Judgment August 31, 2010 Series C No. 216, par. 162 to 163. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparation and Costs. Judgment November 26, 2010 Series C No. 220. Fifteenth operative item and par. 234.

with great urgency.¹⁵⁸ In order to examine whether an investigation is conducted with due diligence as of the first steps thereof, the Inter-American Commission and Court have used for guidance the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. As specified by the Court:

The State authorities that conduct an investigation must, *inter alia*, a) identify the victim; b) recover and preserve the probative material related to the death, in order to facilitate any investigation; c) identify possible witnesses and obtain their statements in relation to the death under investigation; d) determine the cause, method, place and moment of the death, as well as any pattern or practice that could have caused the death, and e) distinguish between natural death, accidental death, suicide and murder. In addition, it is essential to search exhaustively the scene of the crime and autopsies and analyses of human remains must be carried out rigorously by competent professionals, using the most appropriate procedures.¹⁵⁹

164. In addition, the Inter-American Court has held that in situations in which violent deaths take place, investigators must, at the very least, photograph the scene and any other physical evidence, and the body as it was found and after it has been moved; gather and conserve the samples of blood, hair, fibers, threads and other clues; examine the area to search for footprints or any other trace that could be used as evidence, and prepare a detailed report with any observation regarding the scene, the measures taken by the investigators and the assigned storage for all the evidence collected.¹⁶⁰ Also, the Minnesota Protocol establishes, among other obligations, that when a crime scene is investigated the contiguous area to the body must be contained and closed off, and entry thereto must be prohibited, except for investigator and team.¹⁶¹

165. Additionally, with regard to due diligence during the course of the investigation, the Inter-American Court has established that “each act of the State that forms part of the investigative process, as well as the investigation as a whole, should have a specific purpose: the determination of the truth, and the investigation, pursuit, capture, prosecution and, if applicable, punishment of those responsible for the facts.”¹⁶² In this regard, the State must prove that it has conducted an immediate, exhaustive, serious and impartial investigation,¹⁶³ which must be aimed at exploring all possible lines of investigation.¹⁶⁴ The State can be responsible for failing to “order, collect or evaluate evidence” that may be essential to properly elucidate the facts.¹⁶⁵

¹⁵⁸ IA Court of HR. *Case of Zambrano Vélez et al v. Ecuador*. Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 121.

¹⁵⁹ IA Court of HR. *Case of the Moiwana Community v. Suriname*. Judgment June 15, 2005. Series C No. 124, par. 149; IA Court of HR. *Case of Miguel Castro Castro Prison v. Peru*. Judgment November 25, 2006. Series C No. 160, par. 383. Citing the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/.12 (1991). In prior matters, the Commission has used United Nations documentation to assess minimum diligence to be used in such cases. See. IACHR. *Report 10/95, (Manuel Stalin Bolaños Quiñonez)*. Case. 10.580. Ecuador. September 12, 1995, par. 53.

¹⁶⁰ IA Court of HR. *Case of González et al (“Cotton Field”) v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 16, 2009. Series C No. 205, par. 301. The Court refers to the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN, document ST/CSDHA/12 (1991).

¹⁶¹ IA Court of HR. *Case of González et al (“Cotton Field”) v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 16, 2009. Series C No. 205, par. 301..

¹⁶² IA Court of HR. *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment July 10, 2007. Series C No. 167, par. 131.

¹⁶³ IACHR, Merits Report N° 55/97, *Juan Carlos Abella et al* (Argentina), November 18, 1997, par. 412.

¹⁶⁴ IACHR, Report No. 25/09 Merits (Sebastião Camargo Junior) Brazil, March 19, 2009, par. 109. Also see, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 41.

¹⁶⁵ IA Court of HR. *Case of the “Street Children” (Villagrán Morales et al)*. Judgment November 19, 1999. Series C No. 63, par. 230. Also see, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 41.

166. The Commission also observes that the standard of the European Court of Human Rights in the case of *Masneva v. Ukraine*, for purposes of satisfying the requirement of due diligence in an investigation when the facts point to homicide caused by State's agents, is that an "investigation is not effective unless all evidence is properly examined and the findings [are] consistent and reasoned."¹⁶⁶

b. Analysis of the instant case

167. Following an examination of the investigations opened in the domestic arena, the Commission observes that as of the first steps taken in the investigation, several situations arose exposing the lack of due diligence by the Mexican State, particularly the authorities who took control of the scene of the crime and the evidence, as well as the fact that those who ruled on criminal responsibility of the members of the armed forces involved in the death of Mr. Jiménez Hernández were also members of the military.

168. Firstly, the Commission notes that the scene of the crime was exposed to several members of the Mexican Army. The information available to the IACHR indicates that the body remained at the scene until the following day, February 21, 1995. According to statements from private García Torres, after the events, "the Commander of the Company was advised and consequently we then transferred the body to *ejido* la Grandeza, the location of our base of operations." As can be surmised from this statement, the shooter himself, who caused the death of the alleged victim, and other persons who might have been responsible for the incidents by reason of hierarchical rank, removed the body of Mr. Jiménez Hernández, with absolute freedom to change, alter or manipulate the scene of the crime, should they have so wish to.

169. The first certification of the body that the IACHR is aware of was issued at 12:00 hours on February 21, 1995 by an investigating agent of the Special Military Prosecutor's Office, though the body was not located at the scene of the crime at the time of this act of certification. Similarly, the Commission notes that there is no certification in the case file, issued by the Office of the Public Prosecutor, about the initial scene of the death of the alleged victim, nor is there any information on record indicating that the scene of the crime was cordoned off and safeguarded.

170. In this regard, the Commission is struck by inconsistencies to the effect that, while the family members and the Army troops present at the time of the death all concur in asserting that the body fell face down, the body inspection records certify that it was lying face up, because it had already been removed from the scene of the crime. The Commission takes note, as well, that the certificates attesting to the dead body that were issued in the case do not fully concur as to content, inasmuch as the certificate of death issued by the Special Military Prosecutor's Office on February 21, 1995 indicates that he was wearing "[...] black plastic boots, dark pants, white T-shirt, yellow sweater and blue shawl around the neck;" while the inspection report conducted by the Office of the Public Prosecutor on the same date indicates that he was wearing "a light-colored shirt, with a cat figure printed on it and black pants." In other words, at this later point in time when the Office of the Public Prosecutor certified the conditions of the body, it was no longer wearing the aforementioned yellow sweater and the blue shawl on the neck. The Commission notices that such evidence could have been relevant to determine the sequence of events of different lines of investigation, such as the fact that he was carrying his daughter on his back tied with a shawl, as was recounted by many witnesses.

171. In addition, the case file before the IACHR contains no indication of an independent, impartial and exhaustive investigation of the location used to search for and gather the relevant evidence. The Commission notices that the items from the scene of the crime were removed and seized by the commander of the Patrol in his capacity as Military Judicial Police, according to the report produced by him. That made it impossible to determine with certainty, for example, whether or not the alleged victim was carrying a weapon at the time of the events, or to know how far away he was from the seized rifles, which according to statements from his son was nearly 4 meters away. Likewise, the information available to the IACHR regarding the investigation proceedings does not indicate whether the projectiles of the weapons fired at the

¹⁶⁶ECHR, *Masneva v. Ukraine*, Application no. 5952/07, 20 December 2011, § 69.

time were collected from the scene, in order to be able to determine what weapon they came from and who shot them, or to know the number of bullets fired in order to determine whether the alleged victim or another victim or another person at the scene, fired a weapon. There is no information on record either that fingerprints were taken from the weapons seized at the scene preserving their state at the time of the events.

172. Also, no record appears in the case file that any evidence related to the weapons of the military agents who took part in the operation was ordered, recovered or preserved. In this regard, we notice inconsistencies as to the number and origin of firearm projectiles that were shot. Additionally, there is a contradiction between the statements of Abner García Torres and the other three soldiers who accompanied him. On the one hand, Abner García Torres testified to the Office of the Public Prosecutor that after shooting into the air, he allegedly shot Mr. Jiménez Hernández and then his fellow soldiers fired from behind in support. On the other hand, the three soldiers who were accompanying him concur in their statements that they did not fire any shots. Besides, testimony was given to the Office of the Public Prosecutor that “approximately three firearm detonations” were fired, “without knowing who [what person or persons] had fired those shots.” These statements were not compared or supported by other evidence. The weapons the army members were carrying or the rounds of ammunition they had on them were not seized, preserved or analyzed either using technical ballistics testing to make it possible to clarify, for example, the number of shots fired by each one of the them during the operation.

173. The Commission also notices that there are some other inconsistencies in the expert witness opinions, which could point to differences in how events unfolded. In the body inspection certificate issued on February 21, 1995 by a Mexican Army medical surgeon, it states that the body presented “a firearm projectile wound with entry orifice [...] and exit orifice [...] the former located in the right infraorbital region and the latter in the right occipital region with fracture of the right malar.”¹⁶⁷ Whereas, the body inspection conducted by the investigating agent of the Office of the Federal Public Prosecutor at 14:00 hours on February 21, 1995 reports “encephalic mass broken off on the posterior skull, as well as a wound on the right cheek and blood flowing from the right ear.”¹⁶⁸ In turn, the autopsy performed on the body by the forensic examiner of the Office of the Attorney General of Justice of the State of Chiapas on the same day of February 21, 1995, identifies two wounds produced by firearm projectiles, one “located in the malar region of the right side” and the other “at the level of the suprascapular region [of the] right side,”¹⁶⁹ that is, in the posterior zone of the thorax, above the right scapular [shoulder blade].

174. The Commission considers that the aforementioned inconsistencies, which could mean that one of the shots entered from behind Mr. Jiménez Hernández, are problematic in a context in which the attacking position of the alleged victim toward private García Torres was precisely the basis to determine that he acted in legitimate self-defense.

175. Furthermore, the Commission notes that the basis for the State’s hypothesis that the death was caused in legitimate self-defense, points to the technical tests conducted by the ballistics and chemist experts of the General Directorate of Expert Services of the Office of the Attorney General of the State of Chiapas. In this regard, the IACHR takes note that, while the expert report submitted in official letter 2195 of February 21, 1995 regarding the sodium rhodizonate test was positive on both of the hands of Gilberto Jiménez Hernández, this test did not determine – nor could it determine – the time when the weapon was fired nor the type of weapon fired. It should be mentioned that this evidence cannot be considered

¹⁶⁷ **Annex 35.** Medical inspection of body of Gilberto Jiménez Hernández conducted by the medical surgeon of the Mexican Army on February 21, 1995. Annex 21 to petitioners’ submission received on December 9, 2005 and Annex 18 to State’s submission received on April 10, 2006.

¹⁶⁸ **Annex 15.** Site inspection of Ejido La Grandeza conducted by the investigating agent of the Office of the Federal Prosecutor on February 21, 1995. Annex 1 to petitioners’ submission received on December 9, 2005.

¹⁶⁹ **Annex 44.** Autopsy report of the body of Gilberto Jiménez Hernández written by the forensic medical examiner of the PGJ on February 21, 1995. Annex 13 to petitioners’ submission received on December 9, 2005 and Annex 12 to State’s submission received on April 10, 2006.

conclusive, given that the body of Mr. Jiménez Hernández was under the custody of same military members of the operation, including the one who fired the shots, for a long stretch of time during which there could have been manipulation and other forms of cover up.

176. Also, regarding how the investigation unfolded, the Commission notes that after examining as a whole the investigative measures and decisions taken by the officials of the prosecutor's office who were involved, it can be concluded that the investigation into cases against the person allegedly responsible were aimed at closing the case proceedings. Consequently, the military agent directly involved benefited from the decision of the military prosecutor's office to refrain from punishing him, on the grounds of mitigating circumstances of criminal liability in the context of an incomplete, ineffective investigation, lacking independence and impartiality, which was the only decision in the domestic arena as to whether or not to prosecute him.

177. Furthermore, none of the officials of the Federal, State or Military Public Prosecutor's Offices, who conducted the investigation, carried out any contrast and comparison between the different witness's testimonies, which were contradictory or inconsistent with one another, despite doubts being raised from these testimonies as to how events unfolded. There is no evidence either that the statements of eyewitnesses were more thoroughly examined, such as the wife and son's testimonies, as well as the testimony of several other individuals, numbering nearly 70 people, who were present at the time and place of the events in question.

178. In particular, the Commission notices that the decision to close preliminary investigation ADFTA/01/95-E, taken by the Military Public Prosecutor's Office only took into account the statements given by the members of the armed forces, which are consistent with the hypothesis of legitimate self-defense. At the same time, the testimonies available in the case file of those, who claimed that the alleged victim was not carrying a weapon and that private García Torres shot him while he was fleeing along with his family in the environs of *ejido* La Grandeza were discarded –without any reasoning to explain the assessment conducted. The testimonies of the wife and son, who were eyewitnesses to the events and claimed that Mr. Jiménez was carrying his daughter tied to his back with a shawl, were not refuted either.

179. As for the preliminary investigation opened as a result of the filing of the complaint on July 7, 1995 by the brother of the alleged victim, the only things appearing in the case file are the two confirmations of the complaints filed by him, the statements of two family members of the alleged victim and the request for a copy of the autopsy report. The Commission notices that one of the items of evidence that exposes more clearly the lack of due diligence in this investigation into the events is that the case file for the preliminary investigation opened as a result of the complaint filed on July 7, 1995, was lost in 1997. As of the present time, after 18 years have elapsed, we are not aware of any efforts by the authorities to recover the case file, restore the contents thereof and determine potential criminal liability with regard to the facts of the instant case in the ordinary jurisdiction.

180. Lastly, the Commission notes that the petitioners argued on several occasions that the family members of Mr. Jiménez Hernández did not have access to the investigations, as they were told that “Zapatistas” are not provided information. The State did not dispute this argument by introducing any evidence to prove that the family did participate in the investigations.

181. Based on the foregoing, the Commission concludes that the investigations were not aimed at elucidating the facts in a serious way and with due diligence, in violation of the rights to a fair trial and judicial protection, as established in Articles 8.1 and 25.1 of the American Convention in conjunction with the obligations set forth in Article 1.1 thereof, to the detriment of the family members of Mr. Jiménez Hernández.

iii) Reasonableness of time period for the investigation into the events

182. Article 8.1 of the American Convention establishes as one of the elements of due process, that courts must decide the cases submitted to them within a reasonable time. In that respect, the Court held that several elements must be considered in order to determine whether the time in which a proceeding unfolds

is reasonable: a) the complexity of the matter, b) the procedural activity carried out by the interested party, c) the conduct of the judicial authorities¹⁷⁰ and, d) the impairment to the legal situation of the individual involved in the proceeding.¹⁷¹ The Inter-American Court has established that a prolonged delay constitutes per se a violation of judicial guarantees,¹⁷² and therefore, it is incumbent upon the State to explain and prove why it has required more time than would be reasonable to hand down a final judgment in a specific case.¹⁷³

183. In the matter before us, the Commission observes that the events occurred on February 20, 1995 and, the following day, the Federal Office of the Public Prosecutor learned about the events and opened the first preliminary investigation, identified with the number 66/1/95. Notwithstanding, the officials did not conduct an exhaustive investigation into the events reported and transferred the case file to the parties' table only two days after it was opened. Then, the Military Prosecutor's Office took over the investigation into the events on March 8, 1995, which culminated on February 1, 1996 with the closing of the investigation and the Army private under investigation being exonerated of responsibility due to mitigating circumstances. However, as was noted earlier by the Commission, the military criminal jurisdiction should not have conducted the investigation and prosecution of the crimes reported in the complaint because human rights violations were potentially involved. With respect to preliminary investigation 096/89/995, which was opened on July 7, 1995, based on the complaint filed by the alleged victim's brother, the Commission takes note that while some initial steps were taken in the investigation, after it was transferred on August 27, 1996 to the Federal Public Prosecutor's Office, there are no reports or records of any further investigation, but instead that it remained inconclusive because the case file had been lost in a flood. In total, twenty years have elapsed since the prosecutorial authority formally learned of the death of Mr. Jiménez Hernández, and the truth has still not been uncovered as to how the events unfolded nor have the pertinent punishments been meted out.

184. Based on the foregoing, the Commission concludes that the State violated the right to a fair trial and judicial protection as established in Articles 8.1 and 25.1 of the Convention in conjunction with Article 1.1 of this instrument, to the detriment of the next of kin of Mr. Jiménez Hernández, for failure to effectively investigate within a reasonable period of time the death of Mr. Jiménez Hernández, at the hands of a member of the Army.

3. The right to a humane treatment with regard to the investigations by the prosecutors into the death of Gilberto Jiménez Hernández to the detriment of his next of kin.

185. Article 5.1 of the American Convention establishes that "every person has the right to have his physical, mental and moral integrity respected." The Inter-American Court has held that the next of kin of victims of certain human rights violations can be, in turn, victims.¹⁷⁴ In this regard, the Court has considered that the right to mental and moral integrity of the next of kin of victims can be violated based on the additional suffering they have endured as a result of the particular circumstances of the violations

¹⁷⁰ IA Court of HR. *Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs.* Judgment January 29, 1997. Series C No. 30, par. 77; *Case of Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparation and Costs. Judgment September 22, 2009. Series C No. 202, par. 156, and *Case of Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations and Costs. Judgment September 23, 2009. Series C No. 203, par. 135.

¹⁷¹ IA Court of HR. *Case of Valle Jaramillo et al v. Colombia.* Merits, Reparation and Costs. Judgment November 27, 2008. Series C No. 192, par. 155; *Case of Anzualdo Castro v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment September 22, 2009. Series C No. 202, par. 156, and *Case of Garibaldi v. Brazil*, *supra* footnote 32, par. 135.

¹⁷² IA Court of HR. *Case of García Asto and Ramírez Rojas v. Peru.* Judgment November 25, 2005. Series C No. 137, par. 166; *Case of Gómez Palomino v. Peru.* Judgment November 22, 2005. Series C No. 136, par. 85; *Case of the Moiwana Community v. Suriname.* Judgment June 15, 2005. Series C No. 124, par. 160.

¹⁷³ IA Court of HR. *Case of Ricardo Canese v. Paraguay.* Judgment August 31, 2004. Series C No. 111, par. 142.

¹⁷⁴ IA Court of HR. *Case of Cantoral Huamani and García Santa Cruz v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment July 10, 2007. Series C No. 167. par. 112; and *Case of Bueno Alves v. Argentina.* Merits, Reparations and Costs. Judgment May 11, 2007. Series C. No. 164. par. 102.

perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts.¹⁷⁵

186. The Commission has concluded that in the instant case, no thorough and effective investigation was conducted into the events that occurred and it takes note that the family members of the alleged victims witnessed his death at the hands of a military agent. In this type of circumstances, the Court has indicated that:

[...] the absence of a complete and effective investigation into the facts constitutes a source of additional suffering and anguish for the victims and the next of kin, who have the right to know the truth of what happened. This right to the truth requires a procedural determination of the most complete historical truth possible, including the determination of patterns of collective action and of all those who, in different ways, took part in the said violations, as well as their corresponding responsibilities.¹⁷⁶

187. Based on the foregoing, the Commission considers that the loss of their loved one in a context such as the one described in the instant case, as well as the absence of a complete and effective investigation, which in turn causes suffering and anguish at not knowing the truth, makes it possible to infer an infringement of the mental and moral integrity of the next of kin of Mr. Jiménez Hernández in violation of Article 5.1 of the American Convention in conjunction with Article 1.1 thereof to their detriment.

VI. DEVELOPMENTS FOLLOWING THE ADOPTION OF REPORT No. 73/15

188. The Commission adopted Report on Admissibility and Merits No. 73/15 on October 28, 2015, and conveyed it to the State on November 25, 2015. In that report, the Commission recommended that the State:

- a. Make adequate reparation for the human rights violations declared in the instant report in both the material and moral aspect. In complying with this reparation, the State must take into special consideration the damage to the family of Mr. Jiménez Hernández as well as the effects on the community of implementation of the 1994 Chiapas Campaign Plan.
- b. Conduct an impartial, effective investigation within a reasonable period of time in order to thoroughly clarify the facts, identify the masterminds and perpetrators and impose punishment, as appropriate, for the human rights violations declared in the instant report. In the framework of this investigation, the context in which the facts took place must be clarified.
- c. Order administrative, disciplinary, or criminal measures, as appropriate, for the actions and omissions of State officials, which contributed to the denial of justice and impunity in which the facts of the case have remained.

¹⁷⁵ IA Court of HR. *Case of Cantoral Huamani and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment July 10, 2007. Series C No. 167. par. 112; and *Case of Vargas Areco v. Paraguay*. Judgment September 26, 2006. Series C No. 155. par. 96.

¹⁷⁶ IA Court of HR. *Case of Valle Jaramillo et al v. Colombia*. Merits, Reparations and Costs. Judgment November 27, 2008. Series C No. 192, par. 102; *Case of the Massacre of la Rochela v. Colombia*. Merits, Reparations and Costs. Judgment May 11, 2007, Series C No. 163, par. 195; *Case of Heliodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment August 12, 2008. Series C No. 186, par. 146; and *Case of García Prieto et al v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment November 20, 2007. Series C No. 168, par. 102.

- d. Adopt measures of non-repetition including legislative, administrative, and any other measures in order to ensure that the use of force by agents of the State is compatible with the standards described in the instant report.

189. On December 21, 2015, the petitioners requested an extension of the deadline for expressing their stance regarding the referral of the case to the Inter-American Court and their claims concerning reparations and costs. An extension until January 25, 2016, was granted by the Commission on January 11, 2016.

190. On January 13, 2016, the State requested a complete copy of the case file. A copy was duly forwarded by the IACHR on January 14, 2016.

191. On January 25, 2016, the petitioners submitted their filing in compliance with Article 44.3 of the IACHR's Rules of Procedure. In that filing the petitioners expressed their position and the decision of the victims in the case not to seek the referral of the case to the Inter-American Court of Human Rights. They said that the publication and dissemination of the IACHR's report on the merits by the State constituted an adequate form of satisfaction for the victims and they asked the Commission, pursuant to Articles 47 and 48 of its Rules of Procedure, to adopt its final report, to publish it in a timely fashion, and to follow up on it as appropriate. That stance was conveyed to the State for information purposes.

192. On January 26, 2016, the State reported that it had begun talks with the petitioners with a view to reaching an agreement to repair the material and moral harm.

193. On February 25, 2016, the Commission notified the parties that it had decided to proceed with the publication of the report in this case, in accordance with the terms of Article 51 of the American Convention and Article 47 of the IACHR's Rules of Procedure.

194. On that same date, the State submitted a report in which it rejected the IACHR's inclusion of the "94 Chiapas Campaign Plan" document as evidence in Report No. 73/15.

195. It held that by admitting that document, the Commission was in breach of the inter-American system's rules for the admission and appraisal of evidence.

196. It said that under the precedents set by the inter-American system, admitting evidence required identifying: (i) the source from which it came and (ii) the procedure whereby it was obtained. In addition, consideration must be given to: (iii) whether the documents in question were official, (iv) whether their authenticity had been questioned, and (v) whether there was an official position regarding the facts. In addition, it must be appraised in accordance with the principle of healthy criticism.

197. It stated that the only source through which the Commission received the document was the annex to the petitioners' submission that was forwarded to it, which failed to indicate how they obtained the document. It noted that although the document's header named the Secretariat of National Defense, it had no "logo, typography, or indication to associate it with the Government of Mexico." It said that the document had never been officially published by the State and that the Secretariat of National Defense had denied being the author, as indicated in the nonexistence of information resolution that it contributed to the case file. It also reiterated the fact that the State had denied its authorship at a hearing before the IACHR.¹⁷⁷

198. The State claimed that the Commission used the document to make *de facto* accusations against it regarding the reasons behind the alleged operation at La Grandeza in which the victim lost his life. However, it rejected those accusations on the grounds that they were based on a document with no evidentiary value whatsoever.

¹⁷⁷ The Commission notes that that claim was made during the hearing on Case 12.790, Manuel Santiz Culebra and others (Acteal Massacre), held during the 156th regular session.

199. It concluded by saying that the characteristics of the submitted document did not meet the standard of proof demanded by the inter-American system and by stating that any redress to be adopted as a consequence of the merits report should not take account of either that document or the recommendations related to it. Finally, it requested that the IACHR amend its merits report to eliminate all references to the “94 Chiapas Campaign Plan” document and the conclusions and recommendations relating to it. That submission was duly forwarded to the petitioners.

200. On March 11, 2016, the petitioners presented their comments on the State’s report. In that submission they said that the Mexican State had shown no interest in complying with the report’s recommendations. They noted that although they held a meeting with the State on March 7, 2016, it was a part of the follow-up on other cases represented by the petitioning organization, and so the State had not organized a meeting exclusively to deal with matters related to this case.

201. With regard to the State’s request that the IACHR amend its merits report to exclude all references to the “94 Chiapas Campaign Plan” document, they maintain that under Articles 30 and 37 of the Commission’s Rules of Procedure the deadline for the State to make comments on the evidentiary value of the document in question has passed and so its contentions are inadmissible. They also hold that a report adopted under Article 50 of the American Convention is not susceptible to review or appeal.

202. In addition, they noted that in the merits report the Commission introduced other pieces of evidence in addition to the aforesaid document, which corroborate the existence of a context of serious human rights violations occurring during the armed conflict in Chiapas in which the extrajudicial killing of Gilberto Jiménez Hernández took place, and so the appraisal was made in accordance with the rules of healthy criticism.

203. The petitioners requested that the Commission adopt the final report as a way to uphold the right to truth of the victims in this case.

VII. DEVELOPMENTS FOLLOWING THE ADOPTION OF REPORT NO. 34/16

204. The Commission adopted its Report on Admissibility and Merits No. 34/16 on July 29, 2016 reiterating the recommendations made in Report No. 73/15.

205. The report was conveyed to both parties on August 11, 2016 and pursuant to article 51 of the American Convention, the Commission granted the parties a period of two months to submit information on compliance with the final recommendations made by the IACHR. The Commission will take into account in this section the information provided by the parties during the follow up period to report No. 34/16.

206. On September 30, 2016, the Mexican State requested an extension to respond to the Commission’s request, which was granted by the IACHR on October 27, 2016, for a period of two weeks.

207. On October 28, 2016, the petitioners submitted a report on the status of compliance with the recommendations of Report No. 34/16.

208. In their submission the petitioners indicated that the State has shown no interest in complying with the recommendations made by the IACHR. In this respect they argued that *“neither the representatives nor the victims of the present case have been summoned to a meeting to discuss the details of the compliance, nor the State has sent them any proposal to that effect: this demonstrates a lack of interest on the part of the State to fully repair the victims”*¹⁷⁸.

209. They requested the IACHR to proceed with the publication of the definitive report as a way of guaranteeing the right to the truth of the victims of the case.

¹⁷⁸ Submission of the petitioners from October 28, 2016.

210. They also informed that, as of the date of submission of said report, CEJIL would cease to represent the victims of the case.

211. On November 7, 2016, the State presented its report on the measures taken to comply with the recommendations made by the IACHR. In that report, it submitted a proposal for comprehensive reparation and expressed interest in signing an agreement with the victims on those measures.

212. In the framework of this proposal, it stated that the rehabilitation measures would include: (i) providing medical and psychological care to victims on a preferential and free basis; and (ii) incorporate them into popular insurance. Satisfaction measures would include: (i) making a public apology, headed by federal and state government officials; li) unveil a plaque in commemoration of the victims of the events; iii) appoint a street or school in honor of the victims; And iv) incorporate the victims into existing social programs in the entities (academic studies or professional activities, productive projects).

213. In turn, the guarantees of non-repetition would consist in designing and implementing a public policy aimed at avoiding the repetition of the facts of the case.

214. Finally, the State informed that the compensatory compensation would consist of the payment of material and non-pecuniary damages suffered by the victims. For this, they indicated that the operating rules of the "Trust for the Fulfillment of Human Rights Obligations" would be followed.

VIII. ANALYSIS OF COMPLIANCE WITH THE RECOMMENDATIONS

215. Based on the above information, the Commission will analyze the compliance with the recommendations made in the merits report No. 34/16.

216. The Commission observes that the State merely stated that it had outlined a proposal for comprehensive reparations which it hoped to reach with the victims through the signing of an agreement. In its reports prior to the issuance of report No. 34/16, the State had indicated that it had begun discussions to obtain a reparation agreement for moral and material damages and that, for that purpose, it had scheduled a meeting with the petitioners.

217. However, according to the petitioners, they have not been called to a meeting to arrange reparation measures.

218. On the other hand, the State did not submit specific information on the measures taken to comply with the recommendations indicated in numerals 2, 3 and 4 of the report on the merits 34/16.

219. In this regard, the Commission note that the Merits report no. 73/15 was notified to the State on November 25, 2014. The merits report 34/16 was notified on August 11, 2016. Almost one year since the transmittal of the merits report no. 73/15, the State has not adopted any concrete measure to comply with the recommendations made by the IACHR.

IX. FINAL CONCLUSIONS AND RECOMMENDATIONS

220. In accordance with the legal and factual considerations set out throughout this report, the Inter-American Commission notes that to date the State has submitted no specific information on its compliance with the recommendations made in its merits report. The Commission concludes that the Mexican State is responsible for:

a) Violation of the right to life and to the principle of equal treatment and non-discrimination, as established in Articles 4.1 and 24 of the American Convention in conjunction with the obligations set forth in Articles 1.1 and 2 thereof, to the detriment of Gilberto Jiménez Hernández.

b) Violation of the rights to a fair trial and judicial protection, as enshrined in Articles 8.1 and 25.1 of the American Convention, in conjunction with Articles 1.1 and 2 thereof, to the detriment of the next of kin of Gilberto Jiménez Hernández.

c) Violation of the right to humane treatment, as enshrined in Article 5.1 of the American Convention, in conjunction with Article 1.1 thereof, to the detriment of the next of kin of Gilberto Jiménez Hernández.

221. Accordingly, the Inter-American Commission on Human Rights reiterates to the Mexican State the following recommendations:

1. To make adequate reparation for the human rights violations declared in the instant report in both the material and moral aspect. In complying with this reparation, the State must take into special consideration the damage to the family of Mr. Jiménez Hernández as well as the effects on the community of implementation of the 1994 Chiapas Campaign Plan.

2. To conduct an impartial, effective investigation within a reasonable period of time in order to thoroughly clarify the facts, identify the masterminds and perpetrators and impose punishment, as appropriate, for the human rights violations declared in the instant report. In the framework of this investigation, the context in which the facts took place must be clarified.

3. To order administrative, disciplinary or criminal measures, as appropriate, for the actions and omissions of State officials, which contributed to the denial of justice and impunity in which the facts of the case have remained.

4. To adopt measures of non-repetition including legislative, administrative and any other measures in order to ensure that the use of force by agents of the State is compatible with the standards described in the instant report.

X. PUBLICATION

222. Based on the considerations presented and in accordance with Article 47 (3) of its Rules of Procedure, the IACHR decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, pursuant to the instruments governing its mandate, will continue to evaluate the measures taken by the Mexican State in respect of those recommendations until it determines that they have been fully complied with.

Done and signed in the city of Panama City, on the 30th day of the month of November, 2016.
(Signed): Francisco Eguiguren Praeli, First Vice-President; Margarete May Macaulay, Second Vice-President; Paulo Vannuchi, Esmeralda Arosemena de Troitiño, and Enrique Gil Botero, Commissioners.