

**APPLICATION BEFORE  
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

*CASE 12.449*

*TEODORO CABRERA GARCÍA AND RODOLFO MONTIEL FLORES*

*VS.*

*THE UNITED MEXICAN STATES*

**July/August 2010**

**AMICUS BRIEF PREPARED BY**

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## TABLE OF CONTENTS

<b>I. Introduction .....</b>	<b>1</b>
<b>II. Summary of Argument.....</b>	<b>2</b>
<b>III. The United Mexican States Violated Art. 7 of American Convention on Human Rights</b>	<b>3</b>
<b>A. The right to be brought “promptly” before a judge.....</b>	<b>3</b>
<b>(i) The purpose and importance of bringing a detainee promptly before a judge.....</b>	<b>3</b>
<b>(ii) Which authorities constitute officers authorized by law to exercise judicial power</b>	<b>5</b>
<b>(iii) The meaning of “brought before” .....</b>	<b>6</b>
<b>(iv) The meaning of “promptly” .....</b>	<b>7</b>
<b>(v) The delay in this case was excessive and unreasonable .....</b>	<b>8</b>
<b>B. Article 7 of the Convention requires that any authorities who exercise physical custody over detained persons prior to their presentation before a judge must be competent to do so.....</b>	<b>13</b>
<b>(i) The exercise of custody requires exclusive, physical custody over the detainees.....</b>	<b>14</b>
<b>IV. Conclusions and Requests to the Court.....</b>	<b>16</b>

## **I. Introduction**

The Human Rights Clinic of the University of Texas School of Law hereby presents for the consideration of this Honorable Court the following amicus curiae brief in case 12.449, *Teodoro Cabrera García and Rodolfo Montiel Flores vs. the United Mexican States*, in accordance with Rule 41 of the Court's Rules of Procedure as reformed in January 2009 and as applicable to the present case.

The Human Rights Clinic at the University of Texas School of Law is an interdisciplinary group of students that works, under the supervision of Professor Ariel Dulitzky, on human rights cases and projects from the advocate's perspective. The Clinic has substantial expertise in advocating for full implementation of human rights norms including before national, regional and international courts.

The purpose of this brief is to contribute legal arguments relevant to the Honorable Court's resolution of the case of environmental defenders Rodolfo Montiel and Teodoro Cabrera. In particular, the brief discusses the proper interpretation of Article 7 of the American Convention on Human Rights in light of the fact that the victims were not brought promptly before a judge and that the competent authorities did not exercise custody over the victims within any reasonable period of time, given that they remained under the custody of the armed forces for nearly five days. These issues are of special importance and interest for the inter-American human rights system given that they are not unique to this case and given their role in triggering other types of human rights violations such as incommunicado detention and torture. They are also paradigmatic of the heightened vulnerability of persons detained under the supposed justification of *in flagrante* commission of crimes (that is, detained without a judicial order) and of the heightened need for prompt and effective judicial control in such cases. For these reasons, Court should establish not just the violations committed against Montiel and Cabrera but also standards regarding the requirements of Article 7 as applicable to all signatories of the American Convention.

## **II. Summary of Argument**

This brief emphasizes the vulnerability of people who are detained without a warrant. We urge the court to consider the special vulnerability that this type of detention creates and the corresponding duty to ensure effective, prompt judicial control over detainees as well as guaranteeing that the authorities that have custody over the detainees are the competent authorities for this task. In this sense, we emphasize that effective control over a detention requires actual, exclusive physical custody by the competent authority and physical presentation to a judge.

In the rest of this brief, we ask the Court argue to use this opportunity to reinforce and make more explicit the requirements of Art. 7 with regard to the need for prompt judicial control and effective physical custody by competent authorities over detained persons. The brief contains two main arguments.

First, based on the facts as described by the parties, the victims were not brought promptly before a judge, one of the most fundamental guarantees needed to protect the rights and physical integrity of detained persons. Although no precise definition exists of what length of time qualifies as “promptly”, international law at both the inter-American, European, and UN levels indicates that a delay of five days in bringing a detainee before a judge is not reasonable, particularly when there is no valid justification for such a delay. In this case, there is no justification for the military to have retained the victims for nearly five days; indeed, this act increased the vulnerability of the victims to the very violations that judicial control is designed to prevent.

Second, according to the arguments of the parties and the accompanying documents, during the first four full days of their detention, the victims remained under the custody of the Mexican military, an authority not competent to exercise prolonged custody over civilians, even those detained in supposed commission of a crime. The unjustified delay in transferring custody to a competent (civilian) authority is not cured by the existence of documents in which civilian

authorities attest that they assume legal custody for the victims, since effective control by a competent authority requires physical, exclusive custody over the detained person.

### **III. Article 7 of American Convention on Human Rights**

#### **A. The right to be brought “promptly” before a judge**

##### **(i) The purpose and importance of bringing a detainee promptly before a judge**

Article 7(5) of the American Convention on Human Rights (hereinafter American Convention), states:

“[A]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.”<sup>1</sup>

This Court has repeatedly indicated that Article 7(5) of the American Convention is essential to the prevention of illegal and arbitrary detentions. For example, in *Juan Humberto Sanchez v. Honduras*, this Court articulated that Article 7 generally functions to “safeguard ‘both the physical liberty of the individual and his personal safety [...], in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those arrested of the minimum legal protection.’”<sup>2</sup> More specifically, in *Tibi v. Ecuador*, this Court stated:

“[T]he terms of the guarantee set forth in Article 7(5) of the Convention are clear regarding the need for the detainee to be brought promptly before a Judge or competent judicial authority, in accordance with the principles of judicial control

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<sup>1</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>2</sup> Case of Juan Humberto Sánchez, Judgment of June 7, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 99 (2003), para. 77.

and procedural immediacy. This is essential to protect the right to personal liberty and to protect other rights, such as the right to life and to humane treatment. The objective of Article 7(5) is for the detention of a person to be subject to judicial review, the latter being the appropriate control mechanism to avoid arbitrary and illegal arrests.”<sup>3</sup>

The equivalent portion in European human rights law comes from Article 5(3) of the European Convention on Human Rights (hereinafter European Convention), which provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”<sup>4</sup>

It is well settled that the primary goal of Article 5(3) is to ensure the “protection of the individual against arbitrary interferences by the State with his right to liberty.”<sup>5</sup>

A similar provision exists in Article 9 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), which generally deals with the right to liberty and security of the person. Section 3 provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.”<sup>6</sup> We infer from decisions of the Human Rights Committee, authoritative interpreter of the ICCPR, that one of the reasons for requiring a prompt appearance before a judge, as in other systems, is to prevent ill treatment and intimidation of detainees.<sup>7</sup>

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<sup>3</sup> Case of *Tibi v. Ecuador*, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 114 (2004), para. 118.

<sup>4</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3), *opened for signature* November 4, 1950, Europ. T.S. No. 5.

<sup>5</sup> *Brogan and Others v. the United Kingdom*, App. No. 11209/84, 11 Eur. H.R. Rep., para. 58 (1988).

<sup>6</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 9(3).

<sup>7</sup> For instance, when the Committee criticized Zimbabwe’s practice of discretionarily extending detention before seeing a judge to 96 hours in certain cases (rather than the normal legal limit of 48 hours), the Committee explained its criticism by stating that “this practice provides opportunity for ill treatment and intimidation of detainees.” Observations on Zimbabwe UN doc CCPR/C/79/Add. 89, para. 17.

Thus a review of the major international human rights treaties that establish the rights to personal liberty and security reveals that there is consensus regarding the purpose and crucial importance of judicial control in the protection of a range of human rights, and that one of the key components of such control is precisely the promptness with which it is exercised.

**(ii) Which authorities constitute officers authorized by law to exercise judicial power**

To ensure that prompt judicial control protects detainees' rights in the manner envisioned in the American Convention, it is also crucial to define what constitutes a judge or "other officer authorized by law to exercise judicial power" as contemplated in Art. 7(5) of the American Convention.

This Court has interpreted the language of 7(5) in an appropriately concrete manner when States have attempted to circumvent this element by claiming that a non-judicial authority served the requisite judicial function, establishing that the alleged judicial authority must be "competent, independent, and impartial" within the meaning of Article 8(1) of the Convention.<sup>8</sup>

The European Court has similarly set forth criteria required for a person to be considered "a judge or other officer authorised by law to exercise judicial power." In *Schiesser v. Switzerland* the Court held that the criteria require the officer to be independent of the executive branch and the parties, actually to hear the individual physically brought before him or her, and to decide, based on legal criteria, whether or not the detention is justified.<sup>9</sup>

Further, the Human Rights Committee has defined what constitutes a judicial authority pursuant to Article 9(3) ICCPR. In *Kulomin v. Hungary* the Committee set out three criteria:

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<sup>8</sup> See, e.g., Case of Tibi v. Ecuador, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 114 (2004), para. 119; See American Convention on Human Rights, Article 8(1), *supra* note 1 (Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.)

<sup>9</sup> ECHR, *Schiesser v. Switzerland*, Application no. 7710/76, Dec. 4, 1979, para. 31.



independence, objectivity, and impartiality.<sup>10</sup>

In applying the aforementioned criteria, all three human rights organs have determined that a Public Prosecutor is not a competent judicial authority according to the respective treaty provisions.<sup>11</sup> Additionally, this Court has interpreted judicial authority according to the respective treaty provisions to exclude military personnel in cases of civilian detainees.<sup>12</sup>

### (iii) The meaning of “brought before”

The language “brought before” in Article 7(5) of the American Convention refers to the actual, physical presentation of a detainee before the judicial authority so that the judge hears and decides on the legality of the detention, and not a mere notification to a judge of the detention.

For example, in *Chaparro Alvarez & Lapo Iñiguez v. Ecuador*, this Court held that the mere fact that a competent judicial authority is present at the time of the alleged victim’s arrest does not satisfy the requirement of bringing a detainee before a judge according to Article 7(5).<sup>13</sup> Bringing a detainee before a judicial authority means that the judge “must hear the detained person personally and evaluate all the explanations that the latter provides, in order to decide whether to proceed to release him or to maintain the deprivation of liberty.”<sup>14</sup> In other words, the detainee must be *physically* brought before a competent judicial authority who is able to, and who actually does, render a decision regarding the legality of the detention.<sup>15</sup>

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<sup>10</sup> Kulomin v. Hungary (1996) UN Doc. CCPR/C/50/D/521/1992, para. 11.3.

<sup>11</sup> See, e.g., Case of Tibi v. Ecuador, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 114 (2004), para., párr. 119; ECHR, Huber v. Switzerland, 118 Eur. Ct. H.R. (ser. A) para. 40-43 (1990); Kulomin v. Hungary (1996) UN Doc. CCPR/C/50/D/521/1992, para 11.3; Platonov v. Russian Federation (2005) UN Doc. CCPR/C/85/D/1218/2003, para 7.2; Saimijon and Bazarov v. Uzbekistan (2006) UN Doc. CCPR/C/87/D/959/2000, para 8.2; Sultanova v. Uzbekistan (2006) UN Doc. CCPR/C/86/D/915/2000, para 7.7; Bandajevski v. Belarus (2006) UN Doc. CCPR/C/86/D/1100/2002, para. 10.3.

<sup>12</sup> See, e.g., Case of Cantoral Benavides, Judgment of August 18, 2000. Series C, No. 69, para. 75.

<sup>13</sup> Case of Chaparro Alvarez and Lapo Iñiguez. v. Ecuador, Judgment of November 21, 2007. Series C No. 170, para. 85.

<sup>14</sup> Id.

<sup>15</sup> I/A Court H.R., Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 65.

#### (iv) The meaning of “promptly”

In relation to how this Court has interpreted the word “promptly” in Art. 7(5), the Court’s jurisprudence shows that sometimes no further analysis is needed than a review of the length of time. For instance, periods of time such as “almost one week” (six days), thirteen days, or fifteen days are too long and unquestionably violate the “promptly” requirement under Article 7(5), even taking into account in the latter case State arguments regarding the need for emergency measures to counter violent crimes or terrorism.<sup>16</sup> Of course, when a country’s domestic laws place a certain limit on the allowable time period, this will set the acceptable limit under the American Convention as well, since a longer delay would constitute an illegal detention; in one case, the Court has found such a violation based on failure to present detainees before a judge within six hours.<sup>17</sup>

It is worth mentioning that the European Court analyzed the meaning of the word “promptly” in *Brogan v. United Kingdom*,<sup>18</sup> another case in which the respondent State argued that special measures were necessary to respond to terrorism. The Court established:

“[T]he scope for flexibility in interpreting and applying the notion of “promptness” is very limited. In the Court’s view, even the shortest of the four periods of detention, namely the **four days and six hours** spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3).”<sup>19</sup>

As mentioned, the ICCPR also requires promptness under Article 9(3). The Human Rights Committee in General Comment 8 elaborated that although most states have defined in their

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<sup>16</sup> See, respectively, I/A Court H.R. Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 66; I/A Court H.R. Case of García-Asto and Ramírez-Rojas v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, para. 134; Case of Castillo Petruzzi et al. May 30, 1999 Judgment. Series C No. 52, paras. 110-111.

<sup>17</sup> I/A Court H.R., Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 133.

<sup>18</sup> *Brogan and Others v. the United Kingdom*, App. No. 11209/84, Nov. 29, 1988.

<sup>19</sup> *Id.* at para. 62. Our emphasis.

domestic laws what is considered “prompt,” in order to satisfy this requirement, “delays must not exceed **a few days**.”<sup>20</sup>

The jurisprudence of the Human Rights Committee further defines what constitutes an acceptable delay to generally be around 2-3 days. A 3-day delay before seeing a judge was a violation of Article 9(3) in *Borisenko v. Hungary*.<sup>21</sup> In another communication, *Freemantle v. Jamaica*, the Committee held that “in the absence of a justification for a delay of four days before bringing the author to a judicial authority, the Committee finds that this delay constitutes a violation of article 9, paragraph 3, of the Covenant.”<sup>22</sup> Recently, the Human Rights Committee has consistently urged an even stricter standard of no more than 48 hours in its Concluding Observations. In the Concluding Observations on Gabon the Committee instructed the state to “take action to ensure that detention in police custody never lasts longer than 48 hours.”<sup>23</sup> Similarly the Committee called a 48-hour delay “excessive” in its Concluding Observations on the Czech Republic.<sup>24</sup>

**(v) The delay in this case was excessive and unreasonable**

In the case at hand, particularly in light of the alleged *in flagrante* nature of the detentions, it was imperative for Teodoro Cabrera Garcia and Rodolfo Montiel Flores to be brought promptly before a competent judicial authority to ensure that their respective detentions were neither illegal nor arbitrary and to safeguard a range of other human rights.

However, after being detained May 2, Montiel and Cabrera were not brought physically before a judge until May 7 (regardless of a notification to the judicial authority on May 6), an excessive five-day delay.

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<sup>20</sup> General Comment 8: Right to liberty and security of persons (Art 9), UN Doc CCPR General Comment 8 (1982), para. 2. Our emphasis.

<sup>21</sup> *Borisenko v. Hungary* (2002) UN doc. CCPR/C/76/D/852/1999, para. 7.4.

<sup>22</sup> *Freemantle v. Jamaica* (1998) UN doc. CCPR/C/68/D/625/1995, para. 7.4.

<sup>23</sup> Observations on Gabon UN doc. CCPR/CO/70/GAB, para. 13.

<sup>24</sup> Observations on Czech Republic UN doc. CCPR/CO/72/CZE, para. 17.

The examples of both inter-American and international jurisprudence cited in earlier sections indicate that five days exceeds the permissible time period falling within the definition of “promptly”. No further analysis is needed to conclude that a respondent State that delays five days in allowing a judge to exercise control over a detention, particularly a warrantless or alleged *in flagrante* detention, has violated Art. 7(5) of the American Convention.

Even were this Court not to consider that five days is automatically too long a time lapse, what is certain is that any State arguing that this was a reasonable amount of time would face a heavy burden of proof to show why it was impossible to bring the detainees before a judge at any time during those five days. That is, the only potential scenario in which the five-day lapse in bringing the victims before a judge would not violate Art. 7(5) would be if the State provided truly compelling justifications for why it was physically impossible to bring them before a judicial authority any sooner. Such justifications are not present in this case.

The Representatives of the Victims allege that military performed the initial detention of Rodolfo Montiel and Teodoro Cabrera, and then proceeded to retain the victims for almost the entirety of the time period before their presentation before a judge, a fact that in itself could not be justified since the military is not the competent authority to exercise custody over detainees for anything more than the time strictly necessary to place them immediately at the disposition of the competent civilian authority.<sup>25</sup>

The Mexican Government argues that a Public Prosecutor assumed legal custody over the victims on May 4<sup>th</sup>.<sup>26</sup> However, a Public Prosecutor, as repeatedly established in international jurisprudence including that of this Court, is not a competent judicial authority as required under Article 7(5) of the Convention. (Further, for reasons explained in the second section of this brief, there is no indication that this assumption of legal custody was accompanied by the physical transfer of the detainees to the custody of the Public Prosecutor at that time.)

The remaining arguments of the State center on the difficulty of moving the victims through the

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<sup>25</sup> Article 16 of the Political Constitution of the United Mexican States; *see* Section III.b *infra*.

<sup>26</sup> See Mexican Government’s answer to the Application and the Escrito de Argumentos, Solicitudes y Pruebas of the Representatives of the Victims, p. 19.

area where the detention took place due to the alleged rough terrain and activities of criminal groups. We will discuss these arguments in more detail below. First, it is useful to examine a further aspect of the requirement for “prompt” judicial control over detentions: namely, to what extent States may allege obstacles –logistical, social, or otherwise- to justify a normally impermissible delay in bringing a detainee before a judge.

In evaluating State arguments for why certain delays were reasonable, this Court has cited the European Court, which had “held that while the word ‘promptly’ must be interpreted with due regard for the ‘attendant circumstances,’ no situation, however grave, gave the authorities the power to prolong incarceration unduly without violating Article 5(3)” of the European Convention.<sup>27</sup>

The European Court, in its determination of whether or not a State has acted in accordance with the requirement of “promptness” in Article 5(3), has recognized that exigent circumstances could excuse what would otherwise be an impermissible delay. In *Brogan v. United Kingdom*, the Court provided that it would “determine the significance to be attached to those circumstances [alleged context of terrorist attacks] and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose.”<sup>28</sup>

The four victims in *Brogan* were arrested and kept for periods ranging from four days six hours to six days 16 hours before being released. The Court accepted that terrorism in Northern Ireland could allow the State to prolong the amount of time before a detainee sees a judge without violating Article 5(3). But the Court went on to explain that the State:

“[C]annot justify... dispensing altogether with “prompt” judicial control... [T]he scope for flexibility in interpreting and applying the notion of “promptness” is very limited... To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning

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<sup>27</sup> Case of Castillo Petruzzi et al. May 30, 1999 Judgment. Series C No. 52, para. 108.

<sup>28</sup> *Brogan and Others v. the United Kingdom*, App. No. 11209/84, Nov. 29, 1988, para. 48.

of the word "promptly". An interpretation to this effect would import... a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.”<sup>29</sup>

The language of the Court indicates that the burden of proof is on the State to produce valid reasons why such a delay between detention and presentation to a judge occurred in a given case, and that merely alleging a context of terrorism does not suffice. Similarly, in *Aksoy v. Turkey* the European Court found that a detention of 12-14 days constituted a violation of the Convention, even amidst a serious terrorism problem, because “the Government [has] not adduced any detailed reasons before the Court as to *why* the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.”<sup>30</sup>

In *Ocalan v. Turkey*<sup>31</sup> the State claimed that it had been justified in prolonging the period of the victim’s detention, extending this time period on the fourth day for three days more because, among other reasons, the judge could not make it to the detainee sooner due to adverse weather conditions. The Court said that the reasons for the extended period of detention were inconsistent and that the weather-related argument, relating to a storm on one afternoon, does not explain why the judge who should have exercised judicial control over the detention made no apparent attempt to have the detainee brought before him during the entire 7-day period.<sup>32</sup>

The Human Rights Committee has explicitly rejected some arguments that purport to justify a delay before seeing a judge. In *Fillastre and Bizouarn v. Bolivia*, the Committee held that budgetary constraints do not justify unreasonable delays.<sup>33</sup> Although the Committee said it was “not unsympathetic” to Bolivia’s budgetary difficulties, the fact remained that “the right of Messrs. Fillastre and Bizouarn under article 9, paragraphs 2 and 3, have not been observed.”<sup>34</sup> Additionally, the Committee held that procedural constraints, such as investigations in criminal

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<sup>29</sup> Id. at para. 62.

<sup>30</sup> *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. paragraph 78 (emphasis added).

<sup>31</sup> *Ocalan v. Turkey* (no. 46221/99), 2005-IV Eur. Ct. H.R. paragraph 102.

<sup>32</sup> *Id.* at para. 103-104.

<sup>33</sup> *Fillastre and Bizouarn v. Bolivia* (1991) UN doc. CCPR/C/43/D/336/1988 paras 6.4, 6.5.

<sup>34</sup> *Id.* at para. 6.4.

cases being entirely carried out in written form, which take more time, do not justify unreasonable delays.<sup>35</sup>

In the present case, Mexico has not asserted a legitimate reason for delaying bringing Montiel and Cabrera before a judge. Instead, the Mexican government's extensive description of the rough terrain of the area and its obstacles to transferring Montiel and Cabrera into the custody of the Public Prosecutor without meeting criminals along the way<sup>36</sup> is undermined by the fact that a helicopter was available to transport the detainees, which in fact ultimately came to their exact location when called and took them to a military base on May 4, 1999. Thus, the Mexican government's own version of the facts reflects that it had the possibility of transferring the detainees by helicopter to the Public Prosecutor so that this authority could bring them before a judge.<sup>37</sup>

The Court should also consider that Montiel and Cabrera allege that various other substantive rights were not protected while they were detained. Montiel and Cabrera maintain that they were not able to contact an attorney or family members when they were detained by the military. If this is true, notwithstanding the other violations it entails, it provides a stronger inference that the delay was unreasonable. Further, it appears that the very reasons for seeing a judge, to guard against ill-treatment and intimidation, were not satisfied. Montiel and Cabrera's accounts of their detention allege that they were tortured and forced to sign confessions. The delay, coupled with an absence of procedural safeguards and the violation of substantive rights, confirms that the time elapsed before seeing a judge was too long.

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<sup>35</sup> Id. at para. 6.5.

<sup>36</sup> See Mexican Government's answer to the Application and the Escrito de Argumentos, Solicitudes y Pruebas of the Representatives of the Victims, pp. 15-16.

<sup>37</sup> See Mexican Government's answer to the Application and the Escrito de Argumentos, Solicitudes y Pruebas of the Representatives of the Victims, p. 18.

**B. Article 7 of the Convention requires that any authorities who exercise physical custody over detained persons prior to their presentation before a judge must be competent to do so**

Article 7(1) of the American Convention protects the right to personal liberty and security in broad terms, while Articles 7(2) and 7(3) provide guarantees to ensure that when a State detains an individual, the detention is, respectively, lawful and not arbitrary.<sup>38</sup>

Taking the above into account, it is clear that Article 7 of the American Convention contemplates that the process of detaining a person and bringing the detainee before a judge must be carried out in accordance to the domestic laws of a country, including legal designations of who is the competent authority to perform these tasks; this is necessary to fulfill the legality requirement of 7(2) and by extension the non-arbitrariness requirement of 7(3), since a detention carried out by non-competent authorities in violation of domestic law could not be considered anything other than arbitrary. Finally, violation of these articles also implies a violation of 7(1).

The above is of special importance in cases of detentions carried out without a written order, as this fact creates special vulnerabilities for the detained person. *In flagranti* arrests have properly invoked the special attention of the Court, since it is in these circumstances that arbitrary or illegal arrests are more likely to occur.<sup>39</sup> In *Lopez Alvarez vs. Honduras*, for instance, the Court commented that in an *in flagranti* arrest “it is precise that there be an immediate judicial control of said arrest, in order to avoid the arbitrariness or illegality of the measure.”<sup>40</sup> By similar reasoning, it is especially important to ensure that the authorities carrying out the detention and custody of the detainee are the legally designated ones in cases of *in flagrante* detentions.

These considerations lead inevitably to the question of what the precise contours are of the requirement that competent authorities handle the detention and presentation to a judge of a detained person in cases of *in flagranti* arrests. For the purposes of this brief, we will focus our

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<sup>38</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>39</sup> Case of Lopez Alvarez v. Honduras, Judgment of February 1, 2006. Series C No. 141, para. 64.

<sup>40</sup> *Id.*



analysis and arguments on one key aspect of this question: what it means to exercise custody over a detainee and hence, how to evaluate which authorities are exercising such custody at each stage in a detention before the presentation to the judicial authority.

**(i) The exercise of custody requires exclusive, physical custody over the detainees**

Drawing on this Court's past jurisprudence, we argue that the exercise of custody over a detained person requires both physical and exclusive control over that person, such that the authority implementing and supervising the detention prior to presentation before a judge has full power to carry out this tasks unhindered by authorities who have no competence in that sphere.

In coming to this conclusion, we recall the parallel jurisprudence of this Court regarding the need for presentation of a detainee before a judge to be physical, not merely a legal notification. Indeed, the physical presence of the competent authority is essential to the idea of effective control. In *Tibi v. Ecuador*, Daniel Tibi was arrested by officers of the Quito Police force without a court order and was illegally detained for eighteen months.<sup>41</sup> Mr. Tibi was not brought immediately before the case judge, nor did said judge examine him.<sup>42</sup> The Court emphasized that even though a judge is aware of a case or receives the respective police report, these actions do not satisfy Article 7(5). The detainee must personally appear before the proper authority.<sup>43</sup>

Similarly in *Acosta-Calderon v. Ecuador*, the Court stated that the simple awareness of a judge that a person is detained does not satisfy Article 7(5) nor does it protect his right to personal property, life and personal integrity. The Court reiterated that the detainee must appear personally and give his statement before the authority.<sup>44</sup>

For purposes of this brief, we will assume proven, without seeking to demonstrate this point through an analysis of Mexican law here, that authorities who detain someone *in flagrante* are

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<sup>41</sup> Case of Tibi v. Ecuador, Judgment of September 7, 2004, I/A Court H. R., (Ser. C) No. 114 (2004), para. 3.

<sup>42</sup> Id at para. 90.18.

<sup>43</sup> Id at para. 118.

<sup>44</sup> See Case of Acosta Calderon v. Ecuador, Judgment of June 24, 2005, Inter-Am Ct. H.R., (Ser. C) No. 129 (2005), para. 78.

legally required to turn the person over to the Public Prosecutor, as is contemplated in clear terms in Article 16 of the Mexican Constitution. This would mean that members of the Mexican army are not the competent authorities to handle the custody of detainees, except for the period of time strictly necessary to turn them over to the competent authority. If we accept this basic framework, then it is clear that in the case of Montiel and Cabrera, Mexico has not observed the requirement for the detention and custody of the victims to be handled by the competent authorities.

Rodolfo Montiel and Teodoro Cabrera were in the custody of the military for most of their detention. Because the military retained physical custody of the men, the awareness and legal documents provided by civilian authorities (Public Prosecutor) was not an effective assumption of custody by the competent authorities. That is, a competent authority (and in fact a division of a local Public Prosecutor's office, thus ultimately incompetent for reasons of federal versus state jurisdiction) may have been cognizant of Rodolfo Montiel and Teodoro Cabrera's detention within two days of its occurrence. The victims' statements and the evidence and arguments presented by the Representatives of the Victims tend to demonstrate that physical control over the victims remained in the hands of the military, in a military base.<sup>45</sup> The State has provided a police report, a "boleta de retención," but not any records as evidence that would lead to the conclusion that the victims were truly transferred to the physical custody of the civilian authorities. Only transferring the physical custody of the men to the proper civil authority would allow those civilian authorities to control the conditions and modalities of detention of the victims in military hands and to ensure that their due process rights were respected.

Once more, it is instructive to recall the Court's parallel jurisprudence regarding the requirements for effective judicial control. In this sense, the Court has established that the proper judicial authority must be able to exercise the discretion legally entrusted in him or her by personally evaluating the situation, and also must guarantee the rights of the detained. Further, in *Bayarri vs. Argentina* the Court stressed that the proper authority must do more than just be physically present or hear explanations.<sup>46</sup> The Court noted that the judge is the guarantor of the

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<sup>45</sup> See, e.g., Escrito de Argumentos, Solicitudes y Pruebas de los Representantes de las Víctimas, p. 70.

<sup>46</sup> Case of Bayarri vs. Argentina, Judgment of October 30, 2008 Inter-Am Ct. H-R Series C No. 187 (2008) para. 67.

rights of any person in the State's custody and therefore has the task of preventing and ending unlawful and arbitrary detentions – that is, reacting appropriately to the situation based on his or her legal competence, duties, and training.<sup>47</sup>

Applying this general reasoning to the case at hand, we note that once Teodoro Cabrera and Rodolfo Montiel were detained without a warrant, the proper authorities likewise should have been able to assume exclusive control of their detention so as to allow those authorities to be the ones implementing the victims' detention, drawing on their legal authority and training in this area; while this is hardly a guarantee that the rights of detainees will be respected, it is at least a first step toward respecting the law and minimizing arbitrariness in the process. It is this competent authority that should exercise effective control over the detainees and, where needed, use its legally mandated authority, within the boundaries set by applicable law and by the human rights treaties to which Mexico is a signatory, to make any necessary decisions regarding the detention of the victims. It is for these reasons that the mere execution of any legal proceedings, paper transfers or other documents are not sufficient to effect a true transfer of custody.

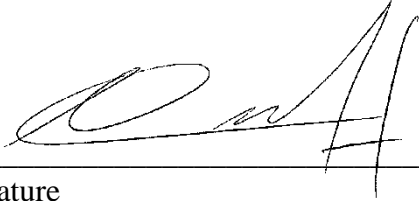
#### **IV. Conclusions and Requests to the Court**

As demonstrated in the foregoing pages, the case of the ecologists Montiel and Cabrera exemplifies both the vulnerability of persons detained in situations of supposed *in flagrante* commission of crimes and how lack of respect for the rights to liberty and security can aggravate this vulnerability. In this case, the victims, detained without a warrant, were not transferred to the physical and exclusive custody of the competent authority to detain them but rather remained in the physical custody of the military. Subsequently, after at last being transferred to a civilian authority after nearly five days of unjustified detention by soldiers, the victims were presented before a judge, exceeding the permissible time period for this to happen.

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<sup>47</sup> Id.

In light of the above, we respectfully suggest that this paradigmatic case provides an excellent opportunity for the Court to give greater specificity to the requirements of Article 7 as well as to emphasize in its eventual sentence the special vulnerability of individuals detained *in flagrante*.

A handwritten signature in black ink, appearing to be 'D. A.', written over a horizontal line.

Signature

Date

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