

# MEXICO

## Silencing dissent: An update on the case of General Gallardo

On 9 November 2001 prisoner of conscience, Brigadier General José Francisco Gallardo Rodríguez, will have served eight years in prison for daring to criticise human rights abuses committed by the Mexican Army. Despite the stated commitment of President Fox's new administration to work to secure General Gallardo's early release, there remains little sign of an end to his incarceration. General Gallardo's ongoing detention is an embarrassing reminder that the administration is yet to have a significant impact on improving respect for human rights in Mexico after nearly a year in office.

By the end of October 2001 the judicial decision was still awaited in the appeal hearing on General Gallardo's case which, if the judge decides in favour of General Gallardo, could result in his release. However, documents available to Amnesty International demonstrate that the Office of the Attorney General, *Procuraduría General de la República* (PGR), is placing pressure on the judge in order to ensure that General Gallardo is not released. The misuse of the judicial system in order to secure the ongoing detention of General Gallardo continues, and President Fox's administration appears unwilling to confront the institutions of the state, such as the PGR, Ministry of Defence and the Office of Attorney General of Military Justice, which are responsible for these abuses.

Freedom of speech continues to come at a price for General Gallardo. At the end of August 2001 an article appeared in the national newspaper, *El Universal*, in which General Gallardo explained how military intelligence and senior officials in the Ministry of Defence were behind the surveillance of him and his family over a number years, as well as being responsible for the campaign of harassment his family has suffered. Two days after the article was published, he was suddenly transferred to a more cramped cell in another wing of the prison housing violent high risk prisoners.

### Silencing dissent<sup>1</sup>

José Francisco Gallardo Rodríguez is the youngest military officer to have held the rank of Brigadier General in Mexico. Born in the state of Jalisco, he served in the Mexican army for more than 30 years. Married with four children, General Gallardo and was decorated with honors.

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<sup>1</sup> Please refer to previous Amnesty International report "Mexico: Silencing dissent: The imprisonment of Brigadier General José Francisco Gallardo Rodríguez, AMR 41/31/97, May 1997.

In October 1993 General Gallardo published an article entitled "The need for a military ombudsman in Mexico" ("*Las necesidades de un ombudsman militar en México*"), in the magazine *Forum*. The article summarized General Gallardo's Master's degree dissertation concerning the need to set up the post of *ombudsman* for the armed forces. On 9 November 1993 he was arrested on charges relating to an alleged crime of embezzlement (*malversación*) of which he had been exonerated four years previously.

As a result of the article published in *Forum*, judicial proceedings were also initiated against General Gallardo for "damaging, libelling and slandering the Mexican army and the institutions which it oversees" "*injurias, difamación y calumnias en contra del ejército mexicano y de las instituciones que de él dependen*" (article 280 of the Military Justice Code, *Código de Justicia Militar*). Charges were also brought under article 350 of the Federal District Penal Code, *Código Penal del Distrito Federal*, which concerns defamation.

In 1994 the civil courts acquitted General Gallardo of the charges relating to defamation and slander. However, over the following years the military authorities initiated more than 15 preliminary investigations and nine criminal proceedings against General Gallardo. *The crimes he was accused of and prosecuted for include: fraud; embezzlement; illicit enrichment; damaging property belonging to the nation; abuse of authority; desertion [abandoning his post]; destroying army property [burning files]; breach of duties obligatory to all who have to serve in the army and discrediting military honour, (fraude, malversación, enriquecimiento ilícito, daño en propiedad de la nación, abuso de autoridad, deserción en su modalidad de abandono de plaza, destrucción de bienes del Ejército en su modalidad de quema de archivos, e infracción de deberes comunes a todos los que están obligados a servir en el Ejército y contra el honor militar).*

General Gallardo in prison. ©AI

*Amnesty International, like other Mexican and international human rights organizations, believes that the Mexican military authorities formulated these charges against General Gallardo solely to prevent his release from prison. Amnesty International adopted General Gallardo as a prisoner of conscience in 1994.*

#### Threats against the Gallardo family

Over a long period prior to and during his detention, General Gallardo and his family reported a campaign, apparently undertaken by the armed forces, to discredit and harass him and family members. The various investigations initiated by the authorities have never led to those responsible being brought to justice.

In March 1994 General Gallardo's car, which his son was using, was stolen from outside the front of the *Recuslorio Sur* Prison, allegedly while parked near a number of police officers. The official investigation produced no results.

In November 1995, General Gallardo's son Marco Vinicio Gallardo Enríquez was attacked and beaten outside his house by two unknown men who told him they knew who he was and who his father was and that he should stop working on his father's case. The official investigation was not concluded.

In early 1996, a parked car belonging to a member of the Committee for the Release of General Gallardo, *Comité Pro Liberación del General Gallardo*, was broken into by persons unknown. They stole papers on the case of General Gallardo and left behind a threatening taped message. An official investigation was opened but produced no results.

On 8 June 1996, Marco Vinicio Gallardo Enríquez was attacked inside his housing estate by two strangers who threatened him and stole his watch, wallet and car keys (but did not take the car). He was later able to recover his credit cards, and for this reason the family felt that the motive behind the attack was not robbery but intimidation. [See Urgent Action 144/96, AMR 41/27/96, 13 June 1996.]

In December 1998, another of the General's sons, Alejandro Gallardo Enríquez, reportedly only narrowly escaped a kidnap attempt by six military intelligence officers, who were subsequently arrested by the civilian authorities. However, they were released shortly after and the case was passed to the Office of the Attorney General of Military

Justice<sup>2</sup>. According to the family, when Alejandro Gallardo Enriquez made his statement to the military prosecutor he was treated as the suspect rather than the victim. The military investigation produced no results and the case was dropped. [see Urgent Action 321/98, AMR 41/46/98, 23 December 1998].

On 7 March 1999 when General Gallardo and his two sons were in the prison yard, a bullet reportedly passed close to the head of Alejandro Gallardo Enríquez and hit a prison wall. The incident was reported to the PGR, but investigations produced no results and the case was dropped.

According to the General Gallardo's family, they have never been officially informed by the authorities of the findings of the investigations.

*Inter American Commission on Human Rights (IACHR)*

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<sup>2</sup>All cases in which military officials are accused of any crime, whether relevant to legitimate acts of military service are passed to the military justice system, where they are rarely investigated fully, particularly if the alleged crimes are human rights violations.

In 1995 General Gallardo's case was filed before the Inter American Commission on Human Rights (IACHR), *Comisión Interamericana de Derechos Humanos*, of the Organization of American States. In 1996 the IACHR published its report on the case (No. 43/96, case 11,430)<sup>3</sup>, which concluded:

"115.... through the detention and continuous submission of General José Francisco Gallardo to 16 preliminary inquiries and 8 criminal cases without a reasonable and justifiable purpose, the Government of Mexico has failed to discharge its obligation to respect and guarantee the rights to personal integrity, legal guarantees, honor and dignity, and legal protection of Brigadier General José Francisco Gallardo Rodríguez, according to articles 5, 7, 8, 11 and 25 of the American Convention, for the repeated acts that have taken place in Mexico since 1988".

The IACHR report concluded that the judicial process against General Gallardo amounted to an "abuse of power" (*desviación de poder*) and made a number of clear recommendations, including that:

- "Brigadier General José Francisco Gallardo be set at liberty immediately;

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<sup>3</sup>Report N° 43/96, Case 11.430, Mexico, October 15, 1996

- *all necessary measures be taken to cease the campaign of persecution, defamation and harassment against Brigadier General José Francisco Gallardo;*
- *those responsible for the campaign of persecution, defamation and harassment against Brigadier General José Francisco Gallardo be investigated and punished."*

Despite the recommendations of the IACHR, in March and April 1998 General Gallardo was tried and convicted of *illicit enrichment and embezzlement* (*enriquecimiento ilícito y malversión*) in two separate criminal proceedings before special military courts (*consejo de guerra*) and sentenced to two terms of 14 years to run consecutively: a total of 28 years' imprisonment. He was also stripped of his army rank. Later the same year the Military High Court, *Tribunal Superior Militar*, confirmed the sentences on appeal and discharged him from the army<sup>4</sup>.

In October 1998 the government Ernesto Zedillo, of the Institutional Revolutionary Party, *Partido Revolucionaria Institucional* (PRI), failed to attend an IACHR session to discuss the implementation of recommendations previously made by the body on General Gallardo's case and a number of others. Despite the Mexican state being subject to international legal obligations; in particular, the American Convention on Human Rights, the Mexican authorities refused to implement the IACHR recommendations, claiming that the division of powers prevented the Executive from influencing judicial authorities, whether military or civilian, to implement the recommendations. The former Government extended this argument to claim the case was closed as the publication of IACHR recommendations was the punishment in itself and implied no further obligations on the state.

In the original report issued by the IACHR, paragraph 102 makes plain the obligation on all state authorities to act on IACHR recommendations. ".. all of the organs of the states

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<sup>4</sup>In February 2000, General Gallardo won an appeal in the civilian courts ordering the authorities to reinstate his military rank. The military authorities, while acknowledging the appeal decision, refused to act on it and continue to call General Gallardo "ex-general".

parties have an obligation to comply in good faith with the recommendations issued by the Commission. The Commission cannot establish the way in which they are to be implemented at the domestic level, however. That task is incumbent upon the Government of each State, which must determine--in accordance with its constitutional and legal precepts--how the recommendations are to be carried out. The Judicial Branch, as one of the organs of the state, has that same obligation to respect the provisions of the Convention. The state cannot allege the division of powers to justify noncompliance with its international obligations".

#### United Nations Working Group on Arbitrary and Illegal Detentions (WGAD)

On 3 December 1998 the WGAD issued an opinion on the General Gallardo's case. The WGAD stated that the reason for Gallardo being deprived of his liberty:

"13..simply seems to be the lawful exercise of his freedom of expression and opinion, as manifested in the published article in which he called for the appointment of an ombudsman for the army.

14. .. there also appear to have been violations of articles 9, 10 and 11 of the Universal Declaration and articles 9 and 14 of the International Covenant, which establish the right of every defendant to be promptly informed of the charges against him in order to be able to prepare his defence, and to be tried within a reasonable time, pre-trial release being subject to guarantees to appear for trial. In the current case, the constant changes in the charges and keeping the defendant in pre-trial detention for five years constitute violations of the above-mentioned principles relating to due process of law."<sup>5</sup>

The working group concluded that: "The deprivation of liberty of José Francisco Gallardo Rodríguez is arbitrary" and requested "the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."

#### General Gallardo in detention and arbitrary reprisals

The treatment of General Gallardo while he has been held in prison has varied over the years. His family have reported a number of instances in which the prison authorities have apparently arbitrarily denied visiting rights or carried out sudden transfers without

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<sup>5</sup>UN Commission on Human Rights\2000 session\Reports: E/CN.4/2000/4/Add.1,17 December 1999, Opinion No. 28/1998 (Mexico)

providing explanations. General Gallardo and his family consider these acts to be part of the campaign of intimidation against him.

In September 1998 Amnesty International delegates undertook a research mission to Mexico. Despite having requested permission to visit General Gallardo in Military Base No. 1, *Campo Militar No. 1*, the delegation was denied access. Only after considerable coverage in the media was access finally granted. Immediately after the visit, guards reportedly removed the books and journals brought by the delegates from Gallardo's cell. Amnesty International material, including letters from members, and the IACHR recommendation on his case were also removed from his cell. According to General Gallardo and his family, this incident typified a pattern of restricted visits and regular harassment by prison guards.

General Gallardo's daughter visiting him in prison ©private

In May 1999 General Gallardo was transferred without prior warning from the military prison *Campo Militar No. 1*, where he had been held since his detention in 1993, to Neza-Bordo civilian prison, in the municipality of Nezahualcoyotl, Mexico state<sup>6</sup>. The military justified the transfer by claiming that General Gallardo was no longer a military official, and therefore should be held as a common prisoner in a civilian prison. The military has since sought to use this argument to distance itself from the case, presenting General Gallardo's detention as a civilian matter.

On 26 August 2001 an article appeared in the national newspaper, *El Universal*, in which General Gallardo explained how military intelligence and senior officials in the Ministry of Defence were behind the years of covert surveillance suffered by him and his family, as well as being responsible for the campaign of harassment against his family. Two days after the article was published, he was suddenly transferred to a more cramped cell in another wing of the prison housing violent high risk prisoners, raising concerns for his safety (see UA 214/01 AMR 41/032/2001, 30 August). The family believes his transfer was a reprisal for the allegations made the newspaper article. The Neza-Bordo prison authorities deny this, claiming that General Gallardo was transferred for his own protection.

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<sup>6</sup>Mexico state, is one of 31 federal states which make up the Federal Republic of Mexican States (*Los Estados Unidos Mexicanos*).

On 6 September 2001 Mexico's governmental human rights institution, the *Comisión Nacional de Derechos Humanos* (CNDH), National Commission of Human Rights, requested protection measures (*medidas cautelares*) on behalf of General Gallardo, calling for the prison authorities to safeguard his physical integrity.<sup>7</sup>

According to General Gallardo's family, the intense national and international response to the incident, led prison authorities to move the high risk prisoners to a different prison wing away from Gallardo's new cell and to install a public telephone nearby, apparently in an attempt to allay fears about his safety.

However, in early October 2001 General Gallardo informed Amnesty International that the Neza-Bordo prison governor had warned him that if he continued to publicly criticise the authorities in relation to his case and his treatment, visits by his family would be restricted. According to the family, two visits were prevented and others made difficult by the introduction of new bureaucratic requirements.

#### General Gallardo: An International Case

The case of General Gallardo is known the world over. Organizations and individuals working on human rights, particularly those working on the right to freedom of expression, remain determined to draw public attention to the plight of General Gallardo and the injustice he has suffered. Gallardo's continuing detention is a permanent reminder to the international community that the rule of law and the protection of human rights remain largely abstract concepts in Mexico.

In October 2000 General Gallardo was awarded the "Freedom to Write" by the PEN International an organization which campaigns on behalf of men and women who have produced work in the face of extreme adversity, who have been punished for exercising their freedom of expression, or who have fought against censorship and defended the right to publish freely. General Gallardo's son travelled to the United States to receive the award in his name and gave a number of talks during his visit to raise the profile of his father's case in the United States.

In March 2001 an Amnesty International delegation led by former Secretary General of Amnesty International, Pierre Sané, met with President Fox. One of the priorities of Pierre Sané's visit was to raise the case of General Gallardo. The delegates were informed that government lawyers were working with General Gallardo's lawyers in order to find a solution to the case, but President Fox himself would make no commitment regarding the early release of General Gallardo.

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<sup>7</sup> The CNDH has always previously refused to act on the case of General Gallardo, like the previous government, claiming Gallardo's prosecution was a purely criminal case for the military courts outside its mandate or not constituting a violation of fundamental human rights.

Later in the mission Pierre Sané was able to meet General Gallardo in prison. In an interview with a newspaper (*Reforma* 15/3/01), Sané spoke about General Gallardo:

"He touched my heart, he has got a fine spirit because he is determined to fight for his ideals, he believes in democracy and that the military should be reformed." (*Me llegó mucho al corazón, tiene muy bien espíritu porque está determinado a luchar por sus ideas, cree en la democracia y que el cuerpo militar se debe reformar*).

In a letter dated 25 June 2001 sent to an Amnesty International group in Spain General Gallardo states:

"When the *Military Ombudsman* article was published in Forum magazine and the Army started to persecute me I felt very alone but little by little my case became known, now it is recognized nationally and internationally. I've received 250 letters from 22 countries around the world, I'm happy and motivated for this support, but especially as the unconstrained power and impunity enjoyed by the Army is now discussed openly in my country." (*Cuando recién salió publicado el artículo del Ombudsman Militar en la revista FORUM y el Ejército comenzó a perseguirme me sentía muy solo, pero a poco se fue haciendo conciencia, ahora es del conocimiento nacional e internacional, me han escrito más de 250 cartas de 22 países del mundo, estoy contento y motivado por ese apoyo pero sobre todo porque en mi país se puso sobre la mesa de debate la prepotencia e impunidad del Ejército*)

#### A new president, new hope?

In December 2000 President Fox assumed power in Mexico, ending over 70 years of unbroken rule by the PRI. Cleaning up Mexico's record of human rights abuses has been a key element of President Fox's stated political agenda. It was hoped that the new president would bring about an early resolution to longstanding cases, which the former government had refused to act on. There was great expectation that General Gallardo, and other prisoners of conscience, might soon be released.

These hopes were immediately dented with the decision by President Fox in late 2000 to name General Macedo de la Concha, the former Attorney General of Military Justice (*Procurador General de Justicia Militar*), as the Attorney General (*Procurador General de la República*), the head of the civilian prosecution service. Amnesty International and many other national and international human rights organizations expressed grave concern at this decision. In a letter to senators urging them not to ratify the nomination of

a military official to this vital post in the civilian judicial system, Amnesty International noted that "over the past 40 years the organization has observed that in countries where members of the military are involved in the civilian justice system, the possibility of defeating the impunity which surrounds human rights violations is made all the more difficult. It is that same type of experience which gave rise to the international community approving international standards like the UN Basic Principles on the Independence of the Judiciary, in 1985."<sup>8</sup>

Furthermore, General Macedo de la Concha, when Attorney General of Military Justice, had been responsible for the politically motivated prosecution of General Gallardo in the military justice system. During this period, he also faced repeated criticism by human rights organizations for failing to ensure effective investigation of military officials alleged to have committed human rights abuses. Since becoming Attorney General, General Macedo de la Concha has introduced a number of other active military personnel to senior posts within the institution, raising further concerns at the increasing role of the military in the civilian prosecution service. Members of President Fox's administration have acknowledged to Amnesty International that General Macedo de la Concha's nomination as the Attorney General has made the rapid release of General Gallardo virtually impossible. In the present climate, the long overdue reforms needed to incorporate fundamental human rights standards into the working practices of all levels of the Attorney General's Office are equally unlikely.

On the positive side, since arriving in office, President Fox's government has taken a number of important steps designed to improve the legislative framework for human rights protection. These have been primarily focussed on commitments to ratify outstanding human rights treaties and remove reservations placed on those ratified by the previous government. In July 2001 Mexico's Foreign Minister, Jorge Castañeda, stated "This government will take up the investigations and the recommendations [of the IACHR] and will comply with them. This is a change of position and this is reflected in our invitation to the IACHR to come to the country to review, alongside the NGOs, the implementation of its recommendations. Obviously these cases are not closed." (La Jornada - 9 July 2001)<sup>9</sup>.

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<sup>8</sup> AI Index: TG AMR 41/00.50

<sup>9</sup> "Este gobierno retomará las investigaciones, las recomendaciones y las cumplirá. Es un cambio de postura y ello se refleja con la invitación que se hizo a la CIDH para que aquí, en el país, se revisara, junto con las ONG, el cumplimiento de sus recomendaciones. Está claro que no son casos cerrados"

The previous administration had unilaterally termed IACHR cases "concluidos" when the recommendations were published without any reference to the government's compliance with the terms of the recommendations. General Gallardo's case is one such case which has been "reopened" ("*retomado*") and therefore the government has committed itself to implement IACHR recommendation 43/96, case 11,430, which calls for the immediate release of General Gallardo.

At the beginning of July 2001, an IACHR delegation visited Mexico to study the cases before the Commission in order to identify the means of implementing outstanding recommendations. During the visit, General Gallardo's lawyer, his family, human rights organizations, representatives of the government and the IACHR delegation held a joint meeting to discuss ways to move the case forward. These included lodging a direct appeal (*amparo direct*) against his conviction with the Supreme Court or pursuing an indirect appeal (*amparo indirecto*) already initiated in February 2001 to force the authorities to comply with the IACHR recommendations. A reduction in his sentence or a presidential pardon would imply General Gallardo's continuing guilt of the criminal charges he is convicted of and would prevent him pursuing the struggle to clear his name. The decision of the meeting was to continue with the indirect appeal. Those present agreed to set up a working group to continue the search for solutions to the case.

#### Ongoing Indirect Appeal

On 19 February 2001, General Gallardo's legal representatives lodged the indirect appeal with the civilian courts seeking to compel the federal authorities to immediately release General Gallardo as stipulated in IACHR recommendation 43/96, case 11,430. In effect this required all the authorities implicated in the case to prepare submissions (*informes justificados*) for a hearing on 11 September 2001 to justify the continued detention of General Gallardo in the face of the IACHR recommendation.

Amnesty International has been able to study the submissions sent to the judge from the Foreign Ministry, (*Secretaria de Relaciones Exteriores* (SRE)), the Minister of Defence (*Secretario de Defensa Nacional*), Attorney General of Military Justice (*Procurador General de Justicia Militar*), and the Attorney General's Office (*Procuraduría General de la República* (PGR)).

The submission of the SRE denies the responsibility or authority of the SRE to compel the relevant authorities to comply with the IACHR recommendation. However, the submission goes on to provide a number of arguments demonstrating the judicial value of the IACHR recommendation. The SRE submission does not argue that the Mexican state is straightforwardly bound to implement IACHR recommendations, but citing the Inter-American Court on Human Rights it notes a State "has the obligation to employ its best efforts to implement the recommendations" (*tiene la obligación de realizar sus*

*mejores esfuerzos para aplicar las recomendaciones*" (para 80, Caso Loayza Tamayo, sentencia 17 septiembre 1997).

The submissions of the Minister of Defence and the Attorney General of Military Justice both confine themselves to straightforward rejections of Gallardo's appeal.

However, it is the PGR submission which argues most aggressively against the appeal. In direct opposition to the SRE submission, it vigorously criticises the judge's decision to grant the appeal hearing in the first place and rejects any obligation on the state to implement the IACHR recommendations. The submission states five times that the IACHR recommendation is not binding on the Mexican authorities ("*no es vinculatorio*"); that it is only a suggestion, an orientation or merely moral (*meramente moral*). It repeatedly criticises the original IACHR investigation, without ever stating specifically what grounds it bases this assessment on. It argues that the case is in fact closed as the only sanction available to the IACHR is the publication of its recommendations, which occurred in 1997, "affecting .. the image of the Mexican state at national and international level" (*afectando ... la imagen del Estado Mexicano a nivel Nacional e Internacional*). It argues that General Gallardo was tried, convicted and sentenced enjoying his full rights as set out in Mexican law; that at no moment has there been a violation of the American Convention on Human Rights ("*en ningun momento se ha incurrido en violación de..[ la] Convención Interamericana de Derechos Humanos*"); "that it is clear that Mexican governments in this case, were and are respectful of the Rule of Law ("*que es claro que los gobernantes mexicanos en el caso en mención, fueron y son respetuosos de Estado de Derecho*".

Central to the conclusions of the IACHR report is the denial of due process and the right to a fair trial. This analysis was in part based on the multiple criminal cases opened against Gallardo "without reason and justifiable purpose"<sup>10</sup> which amounted to a clear abuse of the criminal justice system by the military courts in order to secure the detention and subsequent conviction of General Gallardo. The PGR submission does not engage with these issues or answer these fundamental criticisms, solely arguing that Gallardo is guilty because he was convicted by the courts, ignoring the fact that criminal charges he faced were politically motivated and the judicial process manipulated in order to secure his detention.

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<sup>10</sup> Para 115, Report N° 43/96, Case 11.430, Mexico, October 15, 1996

The PGR submission ends by telling the judge "it is easy to conclude that THE COMPLAINANT SEEKS TO CLAIM VIOLATIONS IN EVENTS THAT ARE NOT MATERIAL TO THIS CASE" ("*es facil concluir que EL QUEJOSO PRETENDE HACER VALER VIOLACIONES EN HECHOS QUE NO SON MATERIA DE LA PRESENTE LITIS*"). In seeking to discredit the IACHR investigation, justify the actions of past and present Mexican governments, and allege the damaging impact of the case on Mexico's image, the PGR appears to wish to influence the judge with many elements which are not directly relevant to the terms of the appeal<sup>11</sup>.

The tone and substance of the PGR submission amounts to a misuse of its powers as the arguments presented are frequently incomplete and lacking impartiality. Amnesty International believes that the submission raises concern that the Mexican authorities may be unwilling or unable to guarantee a fair appeal process.

The arguments put forward in the submissions of the PGR, the Ministry of Defence and the Attorney General of Military Justice appear identical with the position taken by former president Zedillo's administration in rejecting any duty to comply with the IACHR recommendations.

President Fox's administration has made public commitments to fully recognise the IACHR and implement its recommendations. Nevertheless, the PGR submission does exactly the opposite. It is difficult to see how President Fox's commitments on human rights can become a reality whilst the PGR continues to play such a dominant and unrestrained role in the administration justice.

#### The Mexican authorities: Time to act on international obligations

The objective of IACHR recommendations is to ensure that a State complies with the legal obligations it is contracted to under the American Convention on Human Rights (ACHR). To suggest otherwise implies that the analysis and application of the ACHR by the IACHR in concrete cases is an activity devoid of meaning or purpose. According to Article 31.1 of the Vienna Convention on the Law of Treaties (*Convención de Vienna sobre Derecho de los Tratados*), to which Mexico is a State Party, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Therefore, a treaty such as the ACHR, where the intervention of the IACHR is envisaged as a mechanism for ensuring compliance with the treaty, should be interpreted taking into consideration the

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<sup>11</sup> Amnesty International and other human rights organizations have frequently criticised the excessive weight given to PGR recommendations in criminal cases, which frequently amounts to judges passing sentences on the directions of the PGR (see "Mexico: Justice Betrayed - Torture in the judicial system", AMR 41/021/2001, July 2001).

"objective and purpose" of the ACHR itself. This objective and purpose is respect for the human rights recognised by the ACHR and which the IACHR maintain were violated in the case of General Gallardo. Therefore, the recommendations of the IACHR are not irrelevant or without significance, as suggested in the PGR submission, as they should be acted upon by the Mexican authorities as an expression of respect to the objective and purpose of the ACHR.

Article 33 of the ACHR states "The following organs shall have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties to this Convention: the Inter-American Commission on Human Rights ..". There is no doubt, then that the IACHR studied the case and established the violation of General Gallardo's rights as recognised in the ACHR, and that the Mexican authorities must acknowledge this and take effective action to remedy the situation as stipulated by the IACHR recommendation.

In regard to what effective measures should be taken, it is important to remember that article 1.1 of the Convention stresses the commitment of the States Parties, such as Mexico, to respect these rights and to guarantee their free and full compliance. Article 1, Obligation to Respect Rights, states " 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".

The significance of IACHR recommendations was given further weight on 11 September 2001 when Foreign Ministers of the Americas, including Mexico's, adopted by acclamation the Inter-American Democratic Charter. The Charter reinforces the human rights principals embodied in the American Convention on Human Rights and other conventions and instruments. Article 7, Democracy and Human Rights, states: "Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments."

On 17 October at the end of 26<sup>th</sup> Session of the Inter-American Commission on Human Rights, the IACHR issued a statement welcoming the adoption of the Inter-American Democratic Charter as "a significant step towards strengthening the indissoluble link between democracy and human rights" and goes on to note that "Failure to comply with the decisions of the Inter-American Court of Human Rights and the IACHR will certainly be an important consideration in determining, in specific cases, whether the democratic order has been seriously impaired and whether democracy is at risk."

[5. El incumplimiento con las decisiones de la Corte Interamericana de Derechos Humanos y de la CIDH serán sin duda elementos importantes para determinar, en casos concretos, si el orden democrático ha sido seriamente alterado y si la democracia está en riesgo, con lo cual se activarán los mecanismos establecidos en la Carta Democrática Interamericana.]

The real significance and import of IACHR recommendations is clear and as such there is no room for doubt that the duty of all Mexican authorities is to ensure their full implementation. The Mexican authorities must release General Gallardo immediately.

#### Judicial Hearing Postponed

The judicial hearing (*audiencia*) on the case, initially set for early September, has been put back several times due to the repeated failure of the military authorities to pass to the appeal court all the cases files opened against Gallardo in the military courts. At the time of writing a new hearing was set for the end of November 2001. It is unlikely that the judge will reach a swift decision.

### **Conclusions**

General Gallardo was prosecuted and convicted by the military for criticising the military establishment and proposing the creation of a Military Ombudsman to investigate allegations of human rights abuses by and within the Armed Forces.

Politically motivated criminal charges were brought before the military courts in order to secure his detention and conviction. The judicial process was characterised by violations to General Gallardo's fundamental rights as specified by the IACHR and WGAD amounting to the denial of due process. Gallardo was subject to unjustified and excessive pre-trial detention (5 years) and then disproportionate sentencing by military courts. He and his family suffered a systematic campaign of harassment and intimidation intended to silence him and prevent his family from struggling for justice. The detention, prosecution, conviction and sentencing of General Gallardo amounts to a clear abuse of the judicial system and the failure of the authorities in their obligation to ensure a prompt and fair trial.

The United Nations Working Group on Arbitrary and Illegal Detentions and the Inter-American Commission on Human Rights made a clear analysis of the persecution suffered by General Gallardo and his family and recommended the Mexican authorities take immediate action to remedy the situation. The Mexican authorities have consistently failed to act on these recommendations.

The administration of President Fox has taken the welcome step of committing itself to the early resolution of outstanding cases before the Inter-American Commission on Human Rights. It remains unclear whether Mexico's judiciary in the face of strong

pressure from the PGR, will decide to compel the relevant authorities to immediately release General Gallardo in accordance the recommendations of the IACHR.

The stated government policy on human rights and recognition of international human rights mechanisms and consequent obligations on the Mexican state appears to be at odds with the role of the Attorney General's Office and other authorities, which continues deny the impact of such fundamental policy changes.

Amnesty International believes the opportunity is available for all institutions of the Mexican state to take a vital step forward in ending human rights violations in Mexico. The immediate and unconditional release of General Gallardo will be a demonstration that this process is really taking root.

**Recommendations:**

Amnesty International calls on the Mexican authorities to:

- ensure General Gallardo's right to appropriate legal remedies by ensuring a fair appeal process;
- use all appropriate means to ensure the immediate and unconditional release of Brigadier General José Francisco Gallardo Rodríguez;
- abide by commitments to implement the recommendations of Inter-American Commission on Human Rights;
- ensure General Gallardo and his family are not subject to any harassment, intimidation or reprisals for their campaign to secure the release of General Gallardo;
- carry-out prompt, thorough and impartial investigations into all allegations of threats, harassment or intimidation against General Gallardo and his family and publish the results of all past and ongoing investigations into such incidents;
- investigate and bring to justice those responsible for the misuse of the judicial system to silence government critics;

- ensure the physical well-being of General Gallardo while in prison, including that the conditions of his detention are safe and healthy;
- provide adequate compensation for General Gallardo and his family for the human rights violations they have suffered.