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Decided by: Chairman: Professor Claudio Grossman;
First Vice Chairman: Ambassador John S. Donaldson;
Second Vice Chairman: Professor Carlos Ayala Corao;
Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.
Dated: 16 October 1996
Citation: Hernandez v. Guatemala, Case 11.297, Inter-Am. C.H.R., Report No. 28/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)
Represented by: APPLICANTS: Human Rights Office of the Archbishop of Guatemala and International Human Rights Law Group
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I. BACKGROUND

A. The facts denounced in connection with the detention and death of Juan Hernández Lima

1. According to the petitioners (Human Rights Office of the Archbishop of Guatemala and International Human Rights Law Group), Mr. Juan Hernández Lima, a farmer 38 years of age, was arrested by the Police in Guatemala City on April 26, 1993, along with four other people. They were charged with "disorderly conduct" and brought before the Justice of the Peace for Criminal Misdemeanors.

2. The five confessed to having created a "public scandal induced by liquor" and each was order to spend thirty (30) days in prison or pay a fine. During the criminal proceedings, Mr. Hernández was not assisted by defense counsel. The fine was set at 20 quetzales (approximately three dollars at that time), plus two quetzales daily to cancel the 30 days in prison.

3. Three of those sentenced paid the fine and left prison, while Mr. Hernández and the other prisoner remained incarcerated because they were unable to pay the sum of money fixed as the fine.

4. While confined in the Zone 8 Preventive Detention Center, Mr. Hernández died on May 2, 1993. The apparent cause of death was a cerebral edema and an attack of cholera. According to the petitioners, the medical treatment provided by the staff in charge of medical care at the

detention center was inadequate. The Director in charge authorized Mr. Hernández' transfer to a hospital, but the transfer never took place.

5. Mr. Hernández' mother only learned of his detention on May 6, 1993, from neighbors. She was told of her son's death and burial when she appeared at the Preventive Detention Center.

B. The facts alleged in connection with the judicial inquiry into the death of Juan Hernández Lima

6. The petitioners reported that on May 2, 1993, the presiding Justice of the Peace for Criminal Misdemeanors instituted criminal proceedings in connection with the death of Juan Hernández Lima. On May 5, 1993, the case was referred to the First Criminal Examining Court of First Instance (case 1346-93 of. 7).

7. Gabriela de María Lima Morataya, the victim's mother, became a formal plaintiff in the case on July 9, 1993, petitioning the court for the following: 1) amplification of the report of the forensic physician to establish how Mr. Hernández Lima's cerebral edema was caused and whether weapons or blunt instruments had been used to inflict it; 2) whether medical treatment is available that can prevent death from cholera; 3) whether there was negligence or incompetence in the treatment Mr. Hernández received; 4) that the judge: a) request a report from the Zone 18 Preventive Detention Center to ascertain the names of the Director of the Center and whether there is a file on the victim; b) establish the reasons why the victims' relatives were not informed of his death; c) ascertain who dispensed medical treatment to the victim, what treatment he received, and why he was not taken to a hospital facility.

8. The petitioners allege that the criminal proceeding has not made any progress since that time. None of the measures requested by Mrs. Lima as plaintiff have been carried out and she has never been permitted access to the case file.

II. FILING WITH THE COMMISSION

9. The Commission received a complaint on April 1, 1994, and additional information on April 15, 1994. On June 2, 1994, the Commission began to process the case under number 11.297, and forwarded the pertinent parts of the complaint to the Government of Guatemala requesting additional information on the facts denounced and any other information that would enable the Commission to ascertain whether the remedies under domestic law had been exhausted in the instant case.

10. The Government responded to the Commission's request on October 5, 1994. For their part, the petitioners sent their reply to the Commission on February 10, 1995. The pertinent parts of that information were sent to the Government on February 13, 1995.

11. On March 27, 1995, the Government sent to the Commission its reply to the information most recently supplied by the petitioners in the case. The Commission forwarded the pertinent parts of this communication on March 30, 1995, requesting that they make their observations on the Government's reply. The Commission reiterated its request on October 6, 1995.

12. On December 11, 1995, a communication from the petitioners was received at the Commission, requesting an extension of the deadline for responding to the Government's reply, explaining that they had had problems compiling the necessary information and proof because of the Guatemalan courts' refusal to supply the relevant information. By letter dated December 14, 1995, the Commission granted a 30-day extension.

13. The Commission wrote to the Government of Guatemala on December 15, 1995, to request specific information on the domestic proceedings being conducted in connection with the death of Juan Hernández Lima, giving it 30 days in which to reply. The Government never responded to this request for information.

14. The petitioners in the case replied on December 18, 1995, and the pertinent parts of that communication were forwarded to the Government on December 20, 1995.

15. On January 24, 1996, the Commission received a request from the Government, asking for an extension to reply to the instant case. A 30-day extension was granted that same day. The Government sent a communication to the Commission on February 27, 1996 in response to the communication of the petitioners of December 18, 1995.

III. POSITION OF THE PARTIES

A. The petitioners' position

16. The petitioners allege that Mr. Juan Hernández Lima "died inside a Guatemalan jail, from a common illness (cholera) that could have been easily treated." They added that "the treatment received by the prisoners and persons on trial was not befitting human dignity and caused his death."

17. They note that the prison officials were negligent in their treatment of Mr. Hernández Lima; among the irregularities they cite is the fact that the staff of the detention center had provided too little rehydration remedy and failed to transfer their patient to a hospital facility, which would have been the appropriate course of action given the severity of his condition.

18. They went on to add that:

... in any event, both the prison authorities and those in charge of health care in the prison, are directly responsible for ensuring the physical safety of the inmates and respect for their human dignity.

19. They also alluded to the victim's arbitrary arrest. The petitioners allege that Mr. Hernández Lima's detention was in violation of the Guatemalan Constitution: under Article 11, persons in possession of their identification papers may not be arrested for misdemeanors or minor infractions. They contend that:

Juan Hernández Lima had his identification papers with him; hence, under the Constitution he could not be detained for a misdemeanor; his arrest was entirely arbitrary.

20. The petitioners added that Mr. Hernández Lima was never given the benefit of defense counsel and his next-of-kin were not advised of his detention. The petitioners also said that "because he did not have money, he was unable to pay the fine in lieu of imprisonment." They allege that had Mr. Hernández had an opportunity to speak with his next-of-kin, he would have been able to get the money he needed to pay the fine rather than be incarcerated.

21. In a communication dated February 10, 1995, the petitioners made reference to the proceedings instituted to investigate the death of Mr. Hernández Lima, stating that:

Since May 5, 1993, ... the proceedings are with the First Criminal Examining Court of First Instance (case 1346-93 of. 7), although absolutely no progress has been made in the proceedings, even though the mother of Juan Hernández Lima became a formal plaintiff in the case in July of 1993 and petitioned the court seeking numerous measures.

22. The petitioners further allege that it is up to the Office of the Attorney General of the Republic to investigate the criminal acts and, as the Government reported, the Presidential Committee to Coordinate the Executive Branch's Policy on Human Rights (COPREDEH) requested that the Attorney General's Office intervene to conduct the appropriate investigations. However, those investigations produced no results.

23. Finally, the petitioners contend that grounds are present for an exception to the requirement of exhausting remedies under domestic law; under Article 46.2.c of the American Convention on Human Rights (hereinafter "the Convention") that requirement does not apply when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." To support their argument, the petitioners point out that:

Mr. Hernández Lima died exactly 21 months ago and thus far absolutely no progress has been made. The most recent measure was on July 14, 1993; the delay in the administration of justice in the death of Juan Hernández Lima is unwarranted, hence, the petition filed should be admitted.

24. In a communication dated December 18, 1995, the petitioners made reference to the Guatemalan Government's contention that the Commission could not be informed of the judicial measures and investigations taken in the criminal proceedings because "aliens shall not be privy to any investigatory measures." The petitioners argue that this position is a violation of the obligations that Guatemala undertook under the American Convention and also note that:

It is perhaps because of the flagrant delay in the judicial proceedings and the inexcusable negligence in gathering evidence, among other things, that Guatemala is hiding behind this supposed confidentiality vis-a-vis the Inter-American Commission on Human Rights and the victim's mother. In the process, it is violating its own Constitution and, worse still, the norms of the international law of human rights, which under Article 46 of Guatemala's Constitution, take precedence over domestic law.

25. The petitioners repeated that, in their judgment, the exception allowed under Article 46 to the rule requiring exhaustion of internal remedies applies in the instant case.

B. The Government's position

26. In its communication of October 5, 1994, the Government noted that Juan Hernández Lima died on May 2, 1994 at the Zone 18 Preventive Detention Center in Guatemala, "from severe dehydration, abdominal pains and diarrhea." The Government reported on the status of the investigation into the death of Mr. Hernández, stating that the presiding Justice of the Peace for Criminal Misdemeanors went to the Preventive Detention Center the very day that Mr. Hernández died to conduct the first inquiries and that with those first steps criminal proceedings were officially instituted to determine whether authorities were negligent in the death of Mr. Hernández and if so to order the appropriate punishment.

27. The Government also reported that thereafter, the judicial proceedings were remitted to the presiding First Justice of the Peace for Criminal Misdemeanors and, on May 5, 1993, to the First Criminal Examining Court of First Instance, where it was classified as case 1346-93 of. 7. The Government added that the mother of Mr. Hernández Lima became a formal plaintiff in the criminal proceedings and that "no one has been charged in the death of Mr. Juan Hernández Lima."

28. The Government further noted that COPREDEH had requested that the Office of the Attorney General intervene to conduct the pertinent investigations and bring those responsible to trial.

29. As for the admissibility of the petition, the Government stated that since criminal proceedings are still in progress in Guatemala, the Commission must declare the instant case inadmissible.

30. In its observations of March 25, 1995, the Government alleged once again that the remedies of domestic law had not been exhausted and stated the following:

The Guatemalan State categorically rejects the points raised by the petitioner and reiterates its desire and political willingness to seek a prompt and appropriate solution to the instant case by means of a court ruling reached in accordance with the laws of the country.

31. The Government also noted the following:

[The] Government of Guatemala cannot agree to report on the inquiries and measures conducted, because Article 314 of the Code of Criminal Procedure currently in force (Decree 51-92) stipulates that ".... aliens shall not be privy to any investigative measures..."

32. In its response of February 27, 1996, the Government informed the Commission that the criminal case had not been transferred to the Public Ministry for investigation of the case as is required under the new Guatemalan Code of Criminal Procedure. The Government explained

that the Public Ministry had taken the necessary actions to obtain the transfer of the file and to reactivate the proceedings.

IV. ADMISSIBILITY

33. The Court has ruled that when domestic remedies are "ineffective", the exceptions to the requirement of recourse to domestic remedies applies.[FN1] The Commission has established that the domestic remedies have been and are a completely ineffective recourse for protecting the fundamental rights that were compromised in the instant case. A total of 33 months have passed since Mr. Hernández Lima died while in custody and the criminal proceedings have made no headway on the fundamental issue, even though the victim's mother requested a number of court measures. The Government of Guatemala neither alleged nor proved otherwise.

[FN1] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, paragraph 93.

34. In connection with other cases, the Commission noted that "the State of Guatemala has demonstrated that it is unable or unwilling to carry out the inquiry and the due legal proceedings required in order to pursue those responsible for the illegal act..."[FN2]

[FN2] Annual Report of the Inter-American Commission on Human Rights, 1994, Report No. 25/94, Case 10.508, Guatemala, 22 September 1994, pp. 52-53.

35. The Commission believes that in the instant case, the applicable provision is the one contained in Article 46.2.c of the American Convention, which allows exception to the rule requiring exhaustion of domestic remedies when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." The Commission finds no justification for the 33-month delay in the criminal proceedings, a period during which no judicial measures have been taken to further the investigation. This delay has made it impossible to exhaust the domestic remedies, which justifies application of the exception provided for in Article 46.2.c.

36. The petition meets the other requirements for admission and admissibility, as set forth in Articles 44, 46 and 47 of the American Convention and Articles 31 and 32 of the Commission's Regulations.

37. The Commission further notes that in a communication dated December 18, 1995, the petitioners stated that they discounted any possibility of arriving at a friendly settlement in the instant case. Inasmuch as the petitioners have no intention of entering into a friendly settlement proceeding under Articles 48 and 49 of the American Convention, the Commission considers this stage to be exhausted.

V. ANALYSIS

A. Guatemala's failure to comply with its obligation to cooperate with the Commission

38. It is the Commission's considered opinion that Guatemala has failed to honor its obligation to supply the information requested in the instant case. In its communications to the Commission in connection with this case, the Guatemalan Government states that "it cannot agree to report on the investigations and/or measures taken, because Article 314 of the Code of Criminal Procedure currently in force (Decree 51-92) stipulates that '... aliens shall not be privy to investigatory measures...' Also, even in its most recent response of February 27, 1996, the Government did not provide information about the investigative proceedings carried out in the criminal processing of this case. Nor did the Government respond to the specific questions the Commission presented to the Government in the Commission's communication of December 15, 1995 relating to the status of the case and the investigative proceedings carried out.

39. The Commission categorically rejects the Government's contention that it cannot provide information on the grounds that domestic law does not allow the information to be disclosed. First, the Commission considers that the provision of the Criminal Procedure Code which has been cited does not prevent the Government from providing the information to this body. The Government, which would be responsible for supplying the information to the Commission, is not "alien" to the criminal proceeding which it carries out before its courts; nor is the Commission "alien" to the proceeding.

40. Second, the Commission reminds the Government that it is a well-established principle of international law that international obligations undertaken by states may not be superseded by or made subject to domestic laws.[FN3] Guatemala has undertaken a number of international obligations under the American Convention on Human Rights. Among them is the one stipulated in Article 48.1 of the Convention:

When the Commission receives a petition or communication... (a)... it shall request information from the government of the state indicated as being responsible for the alleged violations ... This information shall be submitted within a reasonable period... e) The Commission may request the states concerned to furnish any pertinent information ...

The Convention, therefore, obliges states to furnish information requested by the Commission in the course of developing an individual case.

[FN3] See Article 27 of the Vienna Convention on the Law of Treaties.

41. The information requested by the Commission would enable it to make decisions on a case submitted to it for consideration. A relevant example of the type of decisions in question is Article 8.1 of the Convention, concerning the need to ascertain whether a person was given a court hearing within a reasonable time, or Article 46.2.c. which requires that the Commission determine if there has been an unwarranted delay in rendering a final judgment under domestic remedies. Given the provisions of the American Convention, it would be illogical to contend that

the "confidential phase" of a criminal proceeding may go on indefinitely, thereby making it impossible for the Commission to determine whether the period of time is reasonable or justified.

42. The public authorities of a state--in any of the three branches of government--must interpret domestic law in a manner consistent with international obligations; otherwise, their actions or omissions as agents of the state could make the state internationally liable for violations of international laws. However Guatemala's domestic laws are interpreted, it must comply with the obligation to furnish the Commission with information in connection with the individual case being processed. Otherwise, the Guatemalan Government would be violating the Convention and prejudicing its own defense in the case.

43. The Court has noted that the states' cooperation is a basic obligation in international proceedings under the inter-American system, to wit:

In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.[FN4]

[FN4] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraphs 135 and 136.

44. In the present case, the Government has not answered regarding the denounced facts and has refused to provide information relating to the investigative proceedings carried out in the criminal process in Guatemala. From the Court's holding, we must conclude that the Government of Guatemala cannot defend itself by refusing to provide the evidence needed for the Commission to do a proper analysis of the case. Therefore, the Commission is of the view that Guatemala is refusing to produce additional information and to refute the facts as alleged by the petitioner.

45. Given this situation, the Commission invokes the jurisprudence of the Court to the effect that "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law." [FN5]

[FN5] *Idem*, paragraph 138.

46. The Commission's view is that the facts are not presumed to be true merely because the Guatemalan Government's answers in the instant case were ambiguous or elusive; instead, the

facts as alleged must be analyzed in light of the criteria established here.[FN6] The petitioners must, therefore, meet the admissibility requirements (which have already been met, based on the analysis already done) and the minimum elements of consistency, specificity and credibility in the version of the facts presented in order for those facts to be presumed as true.

[FN6] Annual Report of the Inter-American Commission on Human Rights 1995, Report No. 13/96, Case 10.948, El Salvador, March 1, 1996, pars. 19-21; Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case 10.970, Perú, March 1, 1996, p. 185-86.

47. The Commission is of the opinion that with the information furnished, it can evaluate the petitioner's version of the facts, as prescribed in the American Convention and in the Commission's Regulations. The petitioner presented a detailed and cogent account of the facts, backed up by the documents the petitioner was able to obtain. For example, the Commission's case file contains the document ordering Mr. Hernández's incarceration and his death certificate. When the Government furnished information in connection with the case, it neither refuted the facts alleged by the petitioners nor provided any information or evidence that would cast doubt on the credibility of those facts.

B. Analysis of the violations of the victims' rights

a. General observations

48. Article 1.1 of the American Convention on Human Rights states 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."

49. The Commission has considered the jurisprudence of the Inter-American Court of Human Rights, which stated the following when referring to the duties of states like Guatemala that have ratified the American Convention on Human Rights:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.[FN7]

[FN7] Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 164.

50. Another obligation emanating from Article 1.1 of the Convention, apart from respect for the rights and freedoms recognized in the Convention, is the obligation to ensure the fundamental rights. This means the duty to prevent and investigate violations of human rights, the duty to punish those responsible and the duty to compensate the victim and/or his or her next-of-kin for any actions or omissions by agents of the State that violate rights recognized in the Convention.[FN8]

[FN8] *Idem*, paragraph 166.

b. Violation of the right to personal liberty

51. The right to personal liberty is recognized in Article 7 of the American Convention. This article guarantees a basic human right, which is protection of the individual against arbitrary interference by the state in exercising his or her right to personal liberty.[FN9]

[FN9] See European Court of Human Rights, *Brogan and Others v. United Kingdom*, Judgment of November 29, 1988, Series A No.145-B, paragraph 58.

52. Article 7, paragraphs 1, 2 and 3 read as follows:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

53. As called for under Article 7 of the Convention, the Guatemalan Constitution establishes the conditions under which a person may be detained for offenses of the kind committed by Mr. Hernández in the instant case. Article 11 of the Guatemalan Constitution states the following:

Detention for misdemeanors or minor infractions. Persons whose identity can be established on the basis of documentation, from the testimony of a person of good standing, or by the authorities themselves may not be held in custody.

In such cases, under penalty of punishment, the authority shall confine himself to reporting the facts to the competent judge and to advising the offending party to appear in court within the next forty-eight working hours.

54. The petitioners allege that Mr. Hernández Lima had his identification document with him at the time of his detention. Nevertheless, he was arrested by police, in violation of the Guatemalan Constitution. This fact alone is an express, blatant violation of the right to personal

liberty recognized in the Convention. Mr. Hernández Lima's arrest is an arbitrary arrest under the terms of the Convention.

55. The Guatemalan Constitution also states the following:

Article 7.- Notification of cause. Any individual must be notified ...of the cause for his or her arrest... Notification is to be made by the most rapid means possible and shall go to the individual whom the detainee designates. The authority shall be responsible for seeing that notification is effectively made.

Article 19.c of the Constitution states that inmates "have a right to speak, when they so request, with their relatives, defense attorney, assistant, clergy or physician."

56. According to the petitioners, Mr. Hernández Lima asked the authorities who had him in their custody to notify his mother. The prison record shows Mrs. Lima's address. However, she was never notified. By the time she learned of her son's arrest and death, he had already been buried by the authorities of the detention center.

57. It is also obvious that the Guatemalan authorities' failure to notify next-of-kin is also a violation of Article 7 of the Convention, since it is one of the requirements that the Guatemalan Constitution establishes in the event of an arrest.

c. Violation of the right to life (Article 4) and the right to humane treatment (Article 5)

58. Under articles 4 and 5 of the Convention, every person deprived of his freedom has the right to have the state guarantee the right to life and the right to humane treatment. Consequently, inasmuch as it is responsible for detention facilities, the state is the guarantor of these rights of prisoners.[FN10] The Court has also observed that under Article 1.1, the Guatemalan State "has a legal duty to take reasonable steps to prevent human rights violations." [FN11]

[FN10] Inter-American Court of Human Rights, *Neira Alegría and others*, Judgment of January 19, 1995, paragraph 60.

[FN11] *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 174.

59. As a special guarantee of the rights of detainees, the Guatemalan State must claim and adequately substantiate that it took the measures necessary to guarantee the life and health of Mr. Hernández Lima. The State neither refuted the petitioners' allegations nor presented evidence demonstrating that it took reasonable measures to prevent Mr. Hernández' death.

60. The Guatemalan State, therefore, violated by omission its duty to guarantee the health and life of Mr. Hernández Lima since the victim was in its custody and had no means to turn to his relatives and friends, to an attorney or to a private physician; the State, therefore, had complete control over his life and personal safety.

61. The Commission believes that, with the means available to the petitioner, the latter has made a cogent, specific case for the fact that the Guatemalan State failed to guarantee Mr. Hernández Lima's life and personal safety. More importantly, the Commission has established that the State has not demonstrated that it acted with the diligence required to protect the victim's life and health and, moreover, has refused to supply relevant information on the instant case.

d. Violation of Article 8.2 of the American Convention

62. Article 8.2 of the Convention states that every person accused of a criminal offense is entitled to certain guarantees, among them the following:

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

63. The classification of the behavior for which an individual is arrested, whether it be a violation of minor municipal ordinances, a minor infraction or a misdemeanor, is irrelevant for purposes of the guarantees established in the Convention. Because the right to personal liberty is so very important in the context of the Convention, the Commission considers that the procedural guarantees for those persons deprived of their freedom for the commission of a crime, apply equally to persons detained for violations of minor municipal ordinances, petty crimes or misdemeanors.

64. Mr. Hernández Lima was entitled to the guarantees recognized in Article 8.2 of the Convention. The offense for which he was tried is listed in the Penal Code; because under certain circumstances such offenses warrant incarceration, the offense can be likened to a crime.[FN12]

[FN12] See European Court of Human Rights, De Wilde, Ooms and Versyp vs. Belgium Case, Series A, No. 12.

65. In effect, as the petitioners allege and as the order of incarceration confirms, in the instant case Mr. Hernández Lima did not have the benefit of defense counsel. The Guatemalan Government did not take issue with the petitioners' statements. Consequently, the Commission considers that Guatemala violated the judicial guarantees recognized under Article 8.2 of the Convention.

e. Violation of articles 8.1 and 25 of the American Convention

66. Based on the jurisprudence of the Inter-American Court of Human Rights, under articles 1.1 and 25 of the American Convention the Guatemalan State "has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation." [FN13] It is the duty of the Guatemalan State to undertake an investigation "in a

serious manner and not as a mere formality preordained to be ineffective." [FN14] The duty to investigate, therefore, is an obligation of means, requiring that states practice a reasonable degree of diligence in uncovering the facts.

[FN13] Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 174.
[FN14] Idem, paragraph 177.

67. Article 25 of the American Convention provides the following:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention...

2. The States Parties undertake:

(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state.

68. Article 8.1 of the American Convention provides that:

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.

69. The obligation undertaken under Article 1.1 is a necessary corollary of every individual's right to recourse to a court of law for the protection of the law when he or she is a victim of a violation of any of his or her human rights. If this were not the case, the right to effective recourse recognized in Article 25 would be absolutely devoid of content. [FN15]

[FN15] The Inter-American Court has observed the following in this regard in the Preliminary Objections in the Velásquez Rodríguez case, Judgment of June 26, 1987, paragraph 91: Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1).

70. The Commission is of the view that the right to a recourse, recognized in Article 25 and interpreted in combination with the obligation under Article 1.1 and the provisions of Article 8.1, must be understood as the right of any individual to accede to a court of law when any of his or her rights has been violated--whether that right be recognized by the Convention, the Constitution or the domestic laws of the state--, to have an inquiry by a competent, impartial and

independent tribunal to determine whether or not any violation has occurred and, when appropriate, to determine appropriate compensation.

71. The victim, therefore, has the right to receive from the state a serious investigation, conducted with "the means at its disposal... to identify those responsible, to impose the appropriate punishment...."[FN16]

[FN16] Velásquez Rodríguez Case, Judgment of July 24, 1988, paragraph 174.

72. The Convention requires that states offer effective remedies to victims of human rights violations. The Commission understands that in the cases in which a violation of the right to life occur, the state's failure to provide effective remedies affects the next-of-kin of the deceased and transforms them into indirect "victims" with the right to judicial protection. Defined in the broad sense, this means that they have the right to know the fate of their loved one and the right to compensation.

73. In the instant case, Mrs. Lima became a formal plaintiff in the criminal proceedings in an effort to move the proceedings forward to have her son's death investigated and those responsible punished. The Commission has previously held that, where the right to participate in criminal proceedings is granted to private individuals, the victim and/or his relatives enjoy "a fundamental civil right to go to the courts." [FN17] Mrs. Lima has not received the protection of this right recognized in articles 1, 8 and 25 of the Convention inasmuch as no investigation was conducted and no trial was ever held. As a result, Mrs. Lima has received no compensation and has been unable to learn the circumstances surrounding her son's death and where the responsibility lies.

[FN17] Annual Report of the Inter-American Commission on Human Rights, 1992-1993, Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, 2 October 1992, par. 34; see also Annual Report of the Inter-American Commission on Human Rights, 1992-1993, Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Uruguay, 2 October 1992, par. 41.

74. The private plaintiff, the mother of Juan Hernández Lima, has not been permitted access to information relating to the judicial inquiry into her son's death, although Article 314 of Guatemala's Code of Criminal Procedure allows any party to the proceedings to examine the case files. She has thus been prevented from effectively exercising the right recognized in Article 8.1 of the Convention.

75. International human rights law provides that to determine whether a judicial proceeding has been conducted "within a reasonable period", in keeping with Article 8.1 of the Convention, the specific circumstances of the case in question must be examined with the following three criteria in mind: 1) the conduct of the victim, 2) the conduct of the court, and 3) the complexity

of the case in question.[FN18] These criteria also apply when determining whether a "rapid" recourse has been available, as required under Article 25.1 of the Convention.

[FN18] See European Court of Human Rights, Foti vs. Italy case, Judgement of December 10, 1982, Series A, No. 56, paragraph 56, and Corigliano vs. Italy case, Judgement of December 10, 1982, Series A, No. 57, paragraph 37.

76. As for the conduct of the victim, in the instant case Mrs. Lima became a formal plaintiff in the criminal inquiry into the death of her son on July 1, 1993. Mrs. Lima requested numerous measures obviously intended to gather information from the Guatemalan authorities, information to which she did not have access.

77. As for the conduct of the court, even though Mrs. Lima requested numerous measures at the time she became a formal plaintiff, the petitioners allege that these measures were never taken and that in fact there was no activity by the court subsequent to that date. The Government has not indicated that those measures were taken or that the court carried out any proceedings after July, 1993. Instead, the Government has refused to provide information on this point. However, from the Government's response of February 27, 1996, in which the Government indicates that the investigations in the case will be reactivated and that the case will be transferred to the Public Ministry, it becomes clear that the case was not being handled by the appropriate judicial organ according to the new Criminal Procedure Code and that the relevant proceedings have not been carried out.

78. It is obvious to the Commission that the conduct of the judicial agents of the Government has been negligent. A total of 33 months have gone by without any progress having been made. For that reason, in the Commission's view, it need not evaluate the complexity of the case, since the complete inactivity over a 33-month period is sufficient to conclude that the period is not reasonable and that Mrs. Lima has not had the benefit of a rapid recourse.

79. The Commission concludes that the judicial proceedings to determine Mrs. Lima's rights have not been conducted in accordance with articles 8 and 25 of the Convention.

VI. RESPONSE TO THE COMMISSION'S ARTICLE 50 REPORT

80. Pursuant to Article 50 of the Convention, the Commission, during its 92^o special session, approved Report 22/96 concerning the present case. That report and the recommendations contained therein were transmitted to the Government of Guatemala by communication of May 31, 1996 with a request that the Government inform the Commission of the measures which it had adopted to comply with the recommendations of the Commission and to remedy the situation examined within a period of 60 days. By note of August 6, 1996, the Government of Guatemala responded to Report 22/96.

81. The Commission is pleased to take notice of the Government's acceptance of the recommendation that the Government comply with the requirements of the Convention in the

processing of cases before the Commission and the Government's assurance that it will cooperate in regard to requests made of it. The Commission also notes the significant work currently being carried out by the Government of Guatemala towards the goal of advancing human rights as set forth in the Government's response.

82. However, the Commission finds that the Government has not shown in its response to the Article 50 report that it has fully complied with the most important recommendations of the Commission in order to resolve the situation under examination. The Commission notes that the Government's response makes clear that the Public Ministry is currently carrying out important investigative tasks in relation to the case. However, as the Government recognizes, the investigations still have not been completed and the results have not been made known. The Government has not yet named or prosecuted any person responsible for the violations and no person has been sanctioned. Nor has compensation been provided.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS,

CONCLUDES:

83. Based on the considerations set forth in this report and taking into consideration the observations submitted by the Government of Guatemala in relation to Report 22/96, the Commission concludes the following:

- a. That the Guatemalan State is responsible for violation of the obligation to respect the right to personal liberty (Article 7, paragraphs 1, 2 and 3) and violation of the obligation to respect the judicial guarantees (Article 8.2) of Mr. Juan Hernández Lima, in accordance with Article 1.1 of the American Convention on Human Rights.
- b. That the Guatemalan State is responsible for violation by omission of its obligation to guarantee the right to life (Article 4) and the right to humane treatment (Article 5, paragraphs 1 and 2) of Mr. Juan Hernández Lima, in accordance with Article 1.1 of the American Convention on Human Rights.
- c. That the Guatemalan State is responsible for violation of the obligation to respect the judicial guarantees (Article 8.1) and to provide an effective recourse (Article 25) to Mrs. Gabriela de María Lima Morataya, mother of Mr. Juan Hernández Lima, in accordance with the generic obligation established in Article 1.1 of the American Convention on Human Rights.

RECOMMENDS:

84. The Commission recommends to the State of Guatemala that it:

- a. Investigate the violation of the rights of Mr. Hernández Lima and his mother and punish all those responsible.
- b. Propose a rapid and effective procedure for the compensation of the damages suffered by Mr. Hernández Lima's next-of-kin as a result of the human rights violations identified in this report within the period established in the following paragraph, which procedure must fully and clearly satisfy the requirements for compensation of the inter-American system for the protection of human rights.

c. Ensure the right to a defense and the exercise of the indispensable due process guarantees provided for in Article 8.2 of the Convention in misdemeanor and infraction cases which may result in the detention of the accused.

85. To publish this report, pursuant to Article 48 of the Commission's Regulations and Article 51.3 of the Convention, because the Government of Guatemala did not adopt measures to correct the situation denounced within the time period.