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Title/Style of Cause:	Rolando and Atanasio Hernandez Hernandez v. Mexico
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Decided by:	Chairman: Carlos Ayala Corao; First Vice Chairman: Robert K. Goldman; Second Vice Chairman: Jean Joseph Exume. Commissioners: Alvaro Tirado Mejia, Claudio Grossman, Helio Bicudo.
Dated:	5 May 1998
Citation:	Hernandez Hernandez v. Mexico, Case 11.543, Inter-Am. C.H.R., Report No. 1/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
Represented by:	APPLICANTS: the Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C., and the Center for Justice and International Law
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## I. FACTS ALLEGED

1. On October 20, 1995, Darío Arteaga Pérez, municipal worker (Agente Municipal) of Plan del Encinal, municipality of Ixhuatlán de Madero, State of Veracruz, the Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C., and the Center for Justice and International Law (CEJIL), filed a complaint with the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") according to which on September 8, 1994, at approximately 7:00 a.m., an undetermined number of state judicial police (Policías Judiciales del Estado, PJE) of Veracruz and gunmen at the service of local political boss and former municipal president of Ixhuatlán de Madero, Tranquilino Hernández, arrived at the community of Plan del Encinal, forcefully entered and searched the houses, destroying everything in their path, and inflicted gunshot wounds on Rolando Hernández Hernández and Atanasio Hernández Hernández, ages 17 and 28 years, respectively, who they took with them, bound, when the police left the community. On September 12, 1994, the bodies of Rolando Hernández Hernández and Atanasio Hernández Hernández were found by members of the community of Cantollano in the Chiflón River, eight kilometers down from where the events in question occurred. The bodies showed clear signs of torture.

## II. PROCESSING BEFORE THE COMMISSION

2. On October 20, 1995, the Commission received the petition alleging the responsibility of the Mexican State (hereinafter "the State" or "Mexico") for the violation of the human rights set forth in Articles 4, 5, 7, 8, 25, and 1(1) of the American Convention on Human Rights (hereinafter "the American Convention").

3. On November 8, 1995, pursuant to Article 34 of its Regulations, the IACHR transmitted the pertinent parts of the complaint to the Mexican State, and requested information on the facts alleged and in relation to any other criteria that would enable the Commission to determine whether all the domestic remedies had been exhausted, for which purpose the State was given 90 days.
4. On February 8, 1996, Mexico requested a 30-day extension to provide the information in question to the IACHR; the Commission acceded to the request on February 13, 1996.
5. On March 14, 1996, the IACHR received the response from the Mexican State in regard to this case.
6. On April 30, 1996, the petitioners requested an extension to submit their observations, alleging that they were awaiting important information for the case. On May 1, 1996, the Commission granted a 15-day extension.
7. On May 20, 1996, the IACHR received the petitioners' observations to the Mexican State's response.
8. On July 17, 1996, Mexico forwarded its final observations to the Commission.
9. On May 14, 1997, the IACHR sent a communication to the parties making itself available to them to initiate a friendly settlement procedure in this case.
10. On May 16, 1997, the Commission requested additional information from the Mexican State.
11. On June 13, 1997, the State forwarded the additional information requested, and also communicated its willingness to hear the petitioners' preliminary positions, claims, or proposals.
12. On July 15, 1997, the petitioners communicated their rejection of the proposal to initiate the friendly settlement procedure.

### III. POSITION OF THE PARTIES

#### A. Petitioners

13. The petitioners indicated that at present the community is intimidated and has well-founded fears of further attacks; and that the family members of Rolando and Atanasio have been threatened by the gunmen of local political boss Tranquilino Hernández to cease in their effort to seek justice. Because of this, Rolando's family left the community and went to Mexico City; they later returned because of the difficulties of life in the city. In addition, several families have left their homes and have gone to the mountains because of the constant threats to which they are subjected. The Public Ministry has refused to initiate the respective preliminary inquiry.

14. They said that on November 30, 1994, María Hernández Hernández and Policarpo Hernández Hernández, Rolando's parents, and his wife Teresa Hernández Hernández, as well as the parents of Atanasio, Aurelio Hernández Cruz and Cecilia Hernández Hernández, were called to testify before Mr. Fernando García Constantino, First Assistant to the Deputy Prosecutor of Tuxpan, State of Veracruz. They stated that these declarations included a series of irregularities, since they did not have an interpreter, which would have been essential, as they only speak the Otomí language. They further stated that for that reason, they do not know the contents of their interrogatory, and what they signed, and in addition, that the persons summonsed were not eyewitnesses of the events, since they live in communities other than where the event occurred.

15. They added that on December 6, 1994, the bodies of Atanasio and Rolando were to be exhumed, for which purpose the First Assistant of the Deputy Prosecutor summonsed members of human rights organizations to serve as witnesses at that proceeding. They indicated that the same did not take place, and that in the course of the day for which it had been planned, several irregularities occurred, concluding in the exhumation of Atanasio's body by 16 persons--10 police, two physicians, and four officials who took photographs and filmed--without the presence of the human rights groups.

16. In addition, they stated that there has been an unwarranted delay, since to date a serious and impartial investigation has yet to be carried out to identify and punish the persons responsible, and that there are also serious anomalies in the process. They added that the agent of the Public Ministry refused to come to certify the state in which the bodies were found and the signs of torture, and therefore to give the order for an autopsy to be performed.

17. They also mentioned that the State's position has been to deny any responsibility in the events alleged before the criminal justice system authorities and publicly.

18. In their observations, the petitioners state that to date criminal charges have been filed against two agents of the Dirección General de Seguridad Pública of the State of Veracruz (Juan Hernández García and Felipe Sánchez Hernández). Nonetheless, the witnesses alleged that there had been several agents of the Judicial Police of the State of Veracruz, and that José Antonio Rodríguez Martínez, who holds the rank of captain, commanded the operation. They further stated that others were involved in the events, but that no arrest warrant has been issued for them, nor any criminal charges filed against them; and that the preliminary inquiry should have determined the responsibility of the authorities who planned the operation and gave the orders, but that this was not done.

19. The petitioners also note that in the preliminary inquiry the declarations of the eyewitnesses were not taken, though it was essential to determine the truth of what happened.

20. They added that another irregularity in the investigation is that only Atanasio's body was exhumed, not the bodies of the other victims; and that as for Rolando, December 6, 1994, was set as the date for the exhumation, but after some irregularities an effort was made to perform it without his family's knowledge and consequently it was not done.

21. Finally, they noted that in relation to the exhaustion of domestic remedies, Article 104 of the Constitution, which refers to international treaties, is not the appropriate remedy for determining and punishing the persons responsible, and that in relation to Article 21 of the Constitution, there is no failure to bring a criminal action, but a lack of action and diligence on the part of the Public Ministry, therefore said article should not be applied.

B. The State

22. The Mexican state notes that the State Human Rights Commission (Comisión Estatal de Derechos Humanos) for the State of Veracruz undertook various investigations regarding the complaint in question. The results led to Recommendation 62/94 of October 17, 1994, which in its substantive part proposes: "to give instructions to the appropriate person to draw up and determine, pursuant to the applicable law, the Record of the Preliminary Inquiry that was initiated in light of the events that occurred in the community of Plan del Encinal, municipality of Ixhuatlán de Madero, State of Veracruz..., on September 8 of this year."

23. It adds that this recommendation was accepted by the Judicial Police of the State of Veracruz on November 10, 1994, and that among the investigations carried out by said institution were the respective exhumation and autopsy, performed by the medical examiners and experts in the field; and that, in addition, they had the opinion letter of the medical examiner of the Judicial Police concerning the corpses of Atanasio Hernández Hernández and Rolando Hernández Hernández, which were identified by their parents.

24. The State also mentions that despite the complexity of the case, considering the nature of the events, and due to the isolation of the area, as a result of the preliminary inquiry mentioned criminal charges were filed against Juan Hernández García and Felipe Sánchez Hernández, on September 26, 1995, and the respective arrest warrants were issued.

25. The State further indicates that domestic remedies have not been exhausted, pointing out that the remedies set forth in Articles 21 and 104 of the Constitution need to be exercised.

26. In its final observations Mexico noted that the arrest warrants for Juan Hernández García and Felipe Sánchez Hernández were executed, that to date the probable criminal liability of other persons has not been established, and that the accusations regarding the supposed impunity for various persons are totally and manifestly false, and legally unsustainable.

27. In addition, it argued that there are no legal grounds for not exhausting the amparo proceeding provided for in Article 21 of the Constitution, since the mere fact that a recently-created norm is susceptible of different interpretations does not exempt the complainants from the requirement of prior exhaustion of domestic remedies, especially when a remedy has the potential to succeed in the specific case.

28. As to the threats to which the family members of Rolando and Atanasio Hernández Hernández have been subjected, the State adds that the parents of the deceased have not lodged any complaint with the competent Public Ministry.

#### IV. CONSIDERATIONS WITH RESPECT TO THE COMMISSION'S COMPETENCE

29. The IACHR is competent to hear this case, as it deals with allegations regarding rights recognized in the American Convention, as provided for by Article 44 of the American Convention, to which Mexico has been a party since April 3, 1982. These are: Article 1(1), regarding the obligation to respect the rights; Article 4, the right to life; Article 5, the right to humane treatment; Article 8, the right to a fair trial; and Article 25, the right to judicial protection.

#### V. CONSIDERATIONS REGARDING ADMISSIBILITY

30. This complaint meets the formal admissibility requirements set forth at Article 46(1) of the American Convention, and at Articles 32, 37, 38, and 39 of the Commission's Regulations. In effect, it contains the information on the petitioners, describes the events alleged to violate the human rights protected by the American Convention, and identifies the state considered liable for the alleged violation. In addition, the complaint was submitted within the time period established; no other international proceeding is pending; nor does it replicate a petition already examined by the IACHR.

31. With respect to the requirement of prior exhaustion of domestic remedies, the petitioners indicated that there is an unwarranted delay, since to date no serious and impartial investigation has been undertaken to identify and punish the persons responsible, as criminal charges have been filed against only two agents of the Dirección General de Seguridad Pública of the State of Veracruz, while the witnesses alleged that several agents of the state Judicial Police were present, and that the operation was under the command of a man who identified himself as José Antonio Rodríguez Martínez. They further stated that more persons were implicated in the events, yet no arrest warrants were issued for them, nor any criminal charges filed against them, and that there were a series of serious anomalies in the process.

32. In this respect, Mexico indicated that as a result of the preliminary inquiry a criminal action was brought against Juan Hernández García and Felipe Sánchez Hernández, on September 26, 1995, and the respective arrest warrants were issued, and that they were already executed. In addition, the State noted that to date the likely criminal liability of other persons has not been established, and that the accusations made regarding the supposed impunity enjoyed by several persons are totally and manifestly false and legally unsustainable.

33. The Commission notes that the State has reiterated in this case that domestic remedies had not been exhausted; however, the IACHR also notes that the petitioners expressly stated their unwillingness to engage in a friendly settlement procedure. Under the circumstances, a separate report on admissibility would not have the practical effect of bringing the parties together for such a settlement. The IACHR also believes that the arguments aimed at showing the admissibility or inadmissibility of the instant case are closely related to the analysis of the merits, and in particular with the analysis of the violation of the judicial guarantees and judicial protection provided for in Articles 8 and 25 of the American Convention. Consequently, the Commission shall render its decision on admissibility when analyzing the alleged violation of those rights.

## VI. CONSIDERATIONS ON THE MERITS

34. Based on the submissions of the parties, it appears that while to date it is not proven who assassinated Atanasio and Rolando Hernández Hernández, there would seem to be agreement that State agents were involved in those cases. In effect, the investigations by the Public Ministry for the State of Veracruz indicate that at least two agents of the Dirección Nacional de Seguridad Pública of the State of Veracruz, Juan Hernández García and Felipe Sánchez Hernández, were presumably involved in the events of September 8, 1994, in the community of Plan del Encinal, in the State of Veracruz. In addition, it was established that clear, precise, and concurring statements were made by eyewitnesses, who said they saw state agents involved.

35. In addition to this is the problem of State responsibility, as the petitioners allege, for not having undertaken a serious and effective investigation, since in the course of the investigation irregularities were presumably committed, and other agents of the state police are also involved, to whom no arrest warrants have been issued nor any criminal charges filed to date.

36. In this regard, the IACHR believes that based on the facts narrated by the parties it appears that there were some errors in the process. In effect, the fact that the Public Ministry agent refused to come to certify the state of the bodies and the signs of torture, and therefore to order that an autopsy be performed, as well as the fact that only the body of Atanasio Hernández Hernández was exhumed, constitute an irregularity, as all this evidence is fundamental to determine the circumstances of the deaths of Atanasio and Rolando. In addition, as the petitioners point out, and without the State controverting them, on December 6, 1994, the date set for the exhumation of both bodies, unusual circumstances were noted which, as indicated, kept human rights groups from witnessing the act.

37. In addition, the statement made by the petitioners, not controverted by the State, that the parents of Atanasio and Rolando made statements to the competent authorities, without an interpreter, which was essential as they speak only the Otomí language, constitutes not only a violation of the judicial guarantees provided for in Article 8 of the American Convention, but it also represents a clear irregularity in the process, as they were unaware of the contents of the statement they signed before the Public Ministry.

38. As to the alleged participation of other State agents or private persons in the events in this case, the Commission considers that while the investigations carried out by the State have not established the probable criminal liability of other persons, nor have the petitioners duly proven that other persons participated in the events, the fact that there were irregularities in the process obliges the State to undertake an investigation pursuant to the terms established by the Inter-American Court of Human Rights, which has indicated that:

The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private

interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.[FN1]

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[FN1] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 177.

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39. The petitioners request the IACHR to determine that the Mexican State has violated the rights established in Articles 4, 5, 7, 8, 25, and 1.1 of the American Convention, in the case of Atanasio Hernández Hernández and Rolando Hernández Hernández. Consequently, the Commission shall proceed to a determination with respect to the violation of those rights.

A. Right to due process and to judicial protection

40. Article 8(1) of the American Convention provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal...."

41. In this case, the petitioners have noted that there has been an unwarranted delay in the course of the investigations, since to date, and having the alleged facts occurred in 1994, no serious and impartial investigation has been undertaken to identify and punish those responsible.

42. In this respect, the State indicated that despite the complexity of the case, in view of the nature of the events, and in view of the isolation of the area, as a result of the preliminary inquiry, criminal charges were filed against Juan Hernández García and Felipe Sánchez Hernández, on September 26, 1995, and the respective arrest warrants were issued and executed.

43. On this point, the IACHR must note that while it does not appear in the case that the investigation was not impartial, it does appear clear that there were irregularities in the course of the investigations. In effect, the irregularities identified in the previous part of this report require the State to undertake a serious and effective investigation of the facts. Moreover, not having undertaken a proper investigation of the facts results in an unwarranted delay, as more than three years have elapsed since the events giving rise to this case took place, yet the persons responsible have yet to be tried and judged. While two agents of the Dirección General de Seguridad Pública of the State of Veracruz have been arrested, one must await the respective judicial decision to prove their responsibility in the case. Nonetheless, from the analysis it appears that other persons may have been involved, as material or intellectual authors, who as a result of the irregularities in the investigations have not been tried in court.

44. In addition, the State indicated that domestic remedies have not been exhausted; it indicated that the remedies afforded at Articles 21 and 104 of the Constitution need to be exhausted.

45. The petitioners noted in this regard that Article 104 of the Constitution, on international treaties, is not an adequate remedy for determining and punishing the persons responsible, and

that as for Article 21 of the Constitution, there has not been a failure to file criminal charges, but rather a lack of action and diligence on the part of the Public Ministry, therefore Article 21 should not be applied.

46. With respect to the remedy established in Article 21, the Commission notes that independently of the failure in this case to bring criminal charges, or a lack of action and diligence on the part of the Public Ministry, the IACHR's view of this article has already been set forth in previous reports. The IACHR has previously stated in that regard that:

The argument by the Mexican Government in favor of applying Article 21 of the Federal Constitution of Mexico also fails, insofar as the available means of recourse must be simple, swift and effective in accordance with Article 25 of the American Convention, since, even though an interpretation has been allowed in some cases permitting the exercise of indirect jurisdiction, this interpretation has not met with widespread acquiescence in the Mexican courts: indeed, as the Government of Mexico has indicated, there is another opposite interpretation on this matter, under which the means of recourse referred to in Article 21 of the Constitution is to be the object of legal regulation.[FN2]

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[FN2] IACHR, Annual Report of the Inter-American Commission on Human Rights 1996, p. 483, para. 38.  
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47. With respect to the alleged remedy established at Article 104 of the Constitution, it should be noted that Article 104 provides that:

The federal courts have jurisdiction over:

I. All civil or criminal disputes that arise regarding the observance and enforcement of federal laws or international treaties entered into by the Mexican state. When said disputes affect only private interests, the regular judges and courts of the states and the Federal District may also exercise jurisdiction over them, at the election of the moving party.

48. From the analysis of this article, it can be determined that same sets forth the bases of federal jurisdiction, without referring to any remedy. Also, according to the jurisprudence of the Supreme Court of Justice of Mexico, under Article 104 of its Constitution, in order for federal competence to apply to the above mentioned controversies, it is necessary that the interests affected be not only private; and, in case that only these were affected, competence shall be concurring, thereby allowing the plaintiff to decide which jurisdiction to seek redress in.[FN3] The above mentioned Article 104 does not provide for the simple, prompt and effective recourse according to Article 25 of the American Convention. Moreover, it establishes a concurring jurisdiction for cases of violations of the rights of individuals, so in the instant case it did not matter which court was chosen. Also, according to the Inter-American Court, when a State has alleged lack of exhaustion of domestic remedies, that State has the duty to specify the recourses that must be exhausted, as well as their effectiveness.[FN4] In the instant case, Mexico pointed out the availability of the alleged recourse established by Article 104 of the Mexican

Constitution but it did not inform the IACHR as to the effectiveness of said recourse. The Commission considers that Mexico had the burden of proof in that regard, but it did not supply the IACHR with the evidence necessary to establish whether the recourse was effective or not in this case.

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[FN3] Supreme Court of Mexico, 1992, Case N° 6892.

[FN4] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of June 16 1987, para. 88.  
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49. In view of the foregoing, the IACHR decides that the exceptions to exhaustion of domestic remedies set forth in Article 46.2 b) and c) of the American Convention are applicable to this case, and therefore exempts the petitioners from complying with that admissibility requisite. The Commission also concludes that in the instant case there has been a violation of the right to judicial guarantees and the right to judicial protection, enshrined in Articles 8 and 25 of the American Convention, as well as a violation of the duty to adopt legislative or other measures necessary to give effect to the rights and freedoms protected by that international instrument, according to Article 2 thereof.

B. Right to life

50. Article 4(1) of the American Convention provides: "Every person has the right to have his life respected...."

51. In the instant case, while it has not been proven who was or were responsible for the extrajudicial execution of Atanasio Hernández Hernández and Rolando Hernández Hernández, it appears that it has been shown that State agents were involved; this conclusion stems from the analysis under the previous point.

52. Considering the totality of the evidence and indicia, this Commission considers that State agents were involved in the events that occurred on September 8, 1994, in the community of Plan del Encinal, in which Atanasio and Rolando Hernández Hernández lost their lives; therefore it concludes that the State has violated these persons' right to life, which is set forth at Article 4 of the American Convention.

C. Right to personal integrity

53. Article 5(1) provides: "Every person has the right to have his physical, mental, and moral integrity respected."

54. In the instant case, the IACHR is of the view that the witnesses' statements, which were not refuted by the State, indicate that during the operation undertaken on September 8, 1994, agents of the State police wounded Rolando Hernández Hernández and Atanasio Hernández Hernández, and then took them from the community. In this regard, the mere fact that the two

victims were wounded by firearms shows that they suffered a violation of their physical integrity.

55. In addition, this is shown by the analysis of how the Public Ministry agent acted when finding the victims' bodies, since he, despite the allegations of torture, refused to give the order to have autopsies performed. As indicated above, this shows that there were irregularities in the investigations, and is indicative of an intent to make it difficult to inquire into the truth of the facts.

56. As to the alleged violation of Article 5(2) of the American Convention, which states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment....", the Commission should note that while it is alleged in the petition that the bodies of Atanasio and Rolando Hernández Hernández showed clear signs of torture when found, this has not been proven. In effect, Article 2 of the Inter-American Convention to Prevent and Punish Torture, which was ratified by Mexico on June 22, 1987, states:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

57. In this connection, the IACHR considers that in the instant case there is no clear proof that demonstrates that the events in question fall under this provision. Moreover, the fact that irregularities were shown to exist in the investigation merely creates indicia in this respect, which cannot be taken as evidence when determining whether the torture alleged in fact occurred. For this reason, the IACHR has not found evidence to establish whether Rolando and Atanasio Hernández Hernández were tortured; however, their right to physical integrity was violated, as established in this report.

58. Having analyzed this point, the Commission believes that Rolando and Atanasio Hernández Hernández were victims of a violation of their physical integrity in the events that took place on September 8, 1994, in the Plan del Encinal community, Veracruz State. Consequently, the IACHR concludes that the State violated these persons' right to humane treatment, as set forth in Article 5(1) of the American Convention.

#### D. Right to personal liberty

59. Article 7(1) of the American Convention states: "Every person has the right to personal liberty and security." Article 7(2) reads: "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."

60. Article 16 of the Mexican Constitution provides that:

No arrest warrant may be issued other than by a judicial authority and without a prior allegation, accusation, or complaint of a given act that the law criminalizes and punishes at least by imprisonment, and without facts that fit the criminal definition and the likely responsibility of the accused.... In cases of crimes detected in flagrante delicto, anyone may detain the accused, bringing him or her without delay before the immediate authority, which, with the same swiftness, must bring him or her before the Public Ministry....

61. In this respect, it has already been shown that Rolando and Atanasio Hernández Hernández were deprived of their liberty arbitrarily on September 8, 1994, when they were taken from the community of Plan de Encinal, by agents of the Judicial Police of the State of Veracruz, as there was never any arrest warrant nor were they caught in the act of committing a crime.

62. In consideration of this, the Commission concludes that Mexico has violated the right to personal liberty, set forth at Article 7 of the American Convention, in the case of Atanasio and Rolando Hernández Hernández.

E. Obligation to respect rights

63. The conduct described in sections A, B, C, and D of this chapter constitutes a failure on the part of the State to carry out its commitment, in Article 1(1) of the American Convention, to respect the rights and freedoms recognized in it, and to guarantee their free and full exercise for all persons subject to its jurisdiction.

VII. ACTION OF THE STATE SUBSEQUENT TO REPORT No. 50/97

64. On October 1, 1997, during its 97th Regular Session, the Commission approved Report N° 50/97 in the present case, based on Article 50 of the American Convention. To implement that decision, the Commission transmitted the report to the State, granting it a three-month deadline to take the necessary steps to comply with the recommendations contained therein and thus correct the situation addressed.

65. On January 23, 1988 the Commission received a report from the State describing the action it had taken for that purpose.

66. As to the recommended serious, impartial and effective investigation of the facts denounced and execution of the corresponding penal action, the State once again referred to the order for the release of agents Juan Hernández García and Felipe Sánchez Hernández--the only persons placed on trial for the incidents examined in this case, "since responsibility for the homicide had not been fully demonstrated." That decision was appealed by the prosecuting authority and confirmed on September 4, 1996. The State further noted that the authorities who reviewed the facts lacked sufficient evidence to conclude beyond a doubt that the agents cited--or other persons--were criminally responsible for the arrest, death and other acts to which Rolando and Anastasio Hernández had been subjected.

67. In referring to the IACHR recommendation that compensation be made for the violated rights of Rolando and Atanasio Hernandez, the State declared that "no compensation could be offered until penal responsibility could be reliably proven."

68. The State's arguments concerning the recommended regulation of Article 21 of Mexico's Constitution in order to render effective the guarantees in Articles 8 and 25 of the American Convention were the following:

Aside from the fact that work is now in progress in the Executive Branch to draft a bill that would establish a specific judicial procedure for impugning the failure to exercise or waiver of penal action, on November 11, 1997 Mexico's Supreme Court established jurisprudential thesis CLXV/97, which determines the propriety of an amparo against resolutions addressing the failure to exercise--or a waiver of--penal action in cases involving judgments which might violate individual guarantees.

69. The State goes on to say that the remedy of amparo meets the requirements for the simple, prompt, suitable and effective recourse cited in Article 25 of the American Convention. The State therefore considers protection of the right in question to be immediate, and finds that compliance with the Commission's respective recommendation ought not "...to be subject to the condition that a specific provision be issued to regulate the instrument for impugning the findings of the Attorney General's Office by means of an ordinary jurisdictional procedure."

70. The State ends that report with the following comment:

The foregoing remarks clearly show that there are no differences between the Commission's appraisal and that of the Government of Mexico; and that the recommendations posited in Report 50/97 are being carried out.

#### VIII. CONSIDERATIONS REGARDING THE STATE'S ACTION

71. The State maintains that "it may be clearly seen from the record" of this case that it has "taken every possible step authorized by the nation's juridical system" to carry out the serious, impartial and effective investigation of the acts denounce, as recommended by the IACHR. But the relevant factors cited for the Commission's consideration which have been examined in the course of the present report attest to precisely the contrary.

72. In fact, as indicated in paragraphs 34 through 39 above, the evidence points to various irregularities in Mexico's handling of the present case. The following factors are repeated to that end:

- a) the refusal of the prosecuting authority's agent to certify the state in which the bodies were found and the traces of torture apparent thereon, and to give the order for the pertinent autopsy to be performed;
- b) the circumstances which kept the exhumation of the bodies by human rights groups from being verified; and

c) the statements made by the victims' parents to the prosecuting authority in the absence of an interpreter.

73. The State refused to discuss these irregularities in its response to Report N° 50/97 in this case, limiting its comments to the fact that criminal case N° 317/995 had been lodged against the accused security agents.

74. In previous cases, the IACHR has applied the criteria established in the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions" that were adopted by the United Nations Economic and Social Council's Resolution 1989/65, the purpose of which was to determine whether a State had complied with its obligation to conduct a thorough, prompt and impartial investigation of any summary executions of persons under its exclusive control.[FN5] According to those principles, the purpose of the inquiry in cases of this nature should be to determine the cause, the manner and the moment of death; the person responsible; and the procedure or practice which might have led to the death. There should also be an adequate autopsy; physical and documentary evidence must be collected and analyzed, and statements taken from the witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

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[FN5] Report N° 10/95, Case 10.580, Ecuador, in the 1995 Annual Report of the IACHR, OEA/Ser.L/V/II.91 Doc. 7, rev.3, April 3, 1996, paragraphs 32-34; Report N° 55/97, Case 11.137, Argentina, November 18, 1997, OEA/Ser.L/V/II.97, Doc. 38, paragraphs 413 through 424.  
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75. The principles of reference have been complemented by adoption of the "Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,"[FN6] which states that the broad purpose of the inquiry is to "discover the truth about the events leading to the suspicious death of a victim." To that end, the Manual says that the persons conducting the inquiry should adopt the following measures, as a minimum:

- a) Identify the victim;
- b) Recover and preserve evidentiary material related to the death to aid in any potential prosecution of the persons responsible;
- c) Identify possible witnesses and obtain statements from them concerning the death;
- d) Determine the cause, manner, location and time of death, as well as any pattern or practice that may have caused it;
- e) Distinguish between natural death, accidental death, suicide and homicide;
- f) Identify and apprehend the person or persons involved in the death; and
- g) Bring the suspected perpetrator(s) before a competent court established by law.

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[FN6] United Nations document ST/CSDHA/12.  
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76. To ensure the conduct of a thorough and impartial investigation of an extra-legal, arbitrary and summary execution, the Manual states that "One of the most important aspects is the collection and analysis of evidence." Accordingly, the persons conducting an investigation should have access to the scene where the body was discovered and to the scene where the death may have occurred. The standards set forth in the Manual call for the gathering of evidence to be subject to certain criteria, a number of which are cited below:

- (a) The area around the body should be closed off. Only investigators and their staff should be allowed entry into the area;
- (b) Color photographs of the victim should be taken since these--as compared with black-and-white--may reveal in more detail the nature and circumstances of the victim's death;
- (c) Photographs should be taken of the scene (interior and exterior) and of any other physical evidence;
- (d) A record should be made of the body position and condition of the clothing;
- (e) The following factors should be noted, as they can help to estimate the time of death:
  - (i) Temperature of the body (warm, cool, cold);
  - (ii) Location and degree of fixation of lividity;
  - (iii) Rigidity of the body; and
  - (iv) Stage of body decomposition.
- (...)
- (j) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. When applicable,, tests for gunshot residue and trace metal detection should be performed.

77. The irregularities denounced by the petitioners in the present case concerning the autopsies--which were not disputed by the Mexican State in its response to Report 50/97--lead to the conclusion that the officials responsible did not act with the diligence and strictness required by the incidents in question, and were thus unable to meet (however minimally) the requirements listed above.

78. The only two agents who had been put on trial by the Mexican State in connection with the events addressed by the present case were released for lack of evidence. The State's willingness to resume its investigations of the facts and to punish the persons responsible is subject to the petitioners' presentation of new evidence.

79. To that end, the Commission points out that, clearly, neither the petitioners nor members of the families of Rolando and Anastasio Hernández Hernández are obliged--or are even able--to gather evidence of criminal action in the present case. That function is incumbent upon the Mexican State, for the reasons discussed earlier in paragraph 38 supra.

80. The conclusion reached by the IACHR as to the lack of reliability and efficacy in the investigation stems from all of the elements mentioned above, and it is confirmed by the State's position in this procedural stage. In point of fact, the State neither challenges the facts

denounced, nor does it posit any argument which might enable the IACHR to consider that steps have been taken to comply with the pertinent recommendation in Report 50/97.

81. As to Mexico's argument that it cannot compensate the victims until criminal responsibility is established, the Commission indicates that when a State has been found responsible for violating human rights as described above, that State is obliged to compensate members of the victims' families, regardless of the internal investigations' findings.

82. With regard to regulation of the Constitution's Article 21, the Commission is gratified to note the recent jurisprudential thesis presented by Mexico's Supreme Court, which determines the applicability of a writ of amparo to challenge the resolutions of the Attorney General's Office. That measure of the Judiciary constitutes a positive step toward full effectiveness of the rights enshrined in Articles 8 and 25 of the American Convention. Nevertheless, the Commission notes that this measure is not applicable in the instant case, due to the provision contained in Article 197-A of the Law on Amparo in force in Mexico, which stipulates that:

The resolution to be emitted shall not alter the specific judicial situations resulting from trials in which opposing sentences have been passed.

83. For the reasons stated and substantiated in this report, and in order to reinforce the legal foundations of the norm under discussion, the Commission deems it essential that Article 21 of the Mexican Constitution be regulated by law.

## IX. CONCLUSIONS

84. The claim introduced in the present case is admissible in light of Articles 46, 47 and 48 of the American Convention.

85. Based on the de facto and de jure considerations set forth in this report, the Commission concludes that the State is responsible for violating the right to the judicial guarantees and the judicial protection, to life, to personal security and personal freedom pursuant to Articles 4, 5, 7, 8 and 25 of the American Convention, owing to the events that took place on September 8, 1994 in the community of Plan del Encinal. At that time, agents of the state's police force wounded and arbitrarily arrested Rolando and Atanasio Hernandez and then executed them summarily. To date, no serious investigation has been conducted concerning this case; the persons responsible have not been identified and punished, nor have the members of the victims' families been adequately compensated for their loss.

86. Accordingly, the State has failed to comply with its obligation to respect the human rights and guarantees imposed by Article 1.1 of the American Convention.

## X. RECOMMENDATIONS

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AGREES TO REITERATE THE FOLLOWING RECOMMENDATIONS TO THE MEXICAN STATE:

1. To carry out a complete, serious, impartial and effective investigation of the events described in this report; and, pursuant to the results thereof, to conduct the corresponding penal activities with a view of bringing to trial the presumed perpetrators of the incidents, who have not yet been placed on trial.
2. To make reparation for the consequences of violating the rights stated; such reparation shall include adequate indemnification to members of the victims' families.
3. To adopt the necessary measures for issuance of the law regulating Article 21 of the Mexican Constitution as soon as possible in order to render effective the judicial guarantees and protection set forth in Articles 8 and 25 of the American Convention.

## XI. PUBLICATION

87. On February 24, 1998, the Commission forwarded to the Mexican State Report N° 1/98 adopted in the instant case (Chapters I to X supra), setting a period of three months so that the State may adopt the necessary measures toward compliance with the above mentioned recommendations, and therefore to repair the situation. The deadline expired without reply from Mexico.

88. In view of the foregoing, and taking into account Articles 51(3) of the American Convention and 48 of its Regulations, the Commission decides the following: to reiterate the conclusions and recommendations in chapters IX and X supra, respectively; to make this report public; and to include it in its annual report to the General Assembly of the OAS. The IACHR, according to the rules set forth in the instruments that govern it, shall continue to evaluate the measures adopted by the Mexican State in view of the recommendations herein, until full compliance is achieved.

Approved by the Inter-American Commission on Human Rights (IACHR), in the city of Caracas, Venezuela on the 5th day of the month of May 1998. (Signed): Carlos Ayala Corao, Chairman; Robert K. Goldman, Vice Chairman; Jean Joseph Exume, Second Vice Chairman; Commissioners Alvaro Tirado Mejia, Claudio Grossman and Hélio Bicudo.