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Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Members: Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.
Dated:	13 April 1999
Citation:	Congo v. Ecuador, Case 11.427, Inter-Am. C.H.R., Report No. 63/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
Represented by:	APPLICANT: the Ecumenical Commission of Human Rights

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I. BACKGROUND

1. On November 9, 1994, the Ecumenical Commission of Human Rights (CEDHU) filed a petition against the Republic of Ecuador (hereinafter "the State" or "Ecuador") for violation of the American Convention on Human Rights (hereinafter "the American Convention") to the detriment of Mr. Víctor Rosario Congo.

2. The Commission opened case 11.427 on February 13, 1995. In its 95th session the Commission found that it was competent to hear the case and declared it admissible in Report 12/97[FN1]. The parties were notified of the approval of this Report on March 18, 1997.

[FN1] Report 12/97, Case 11.427, Ecuador, Víctor Rosario Congo, Annual Report of the IACHR 1996.

II. PROCESSING BEFORE THE COMMISSION

3. In the operative part of Report 12/97 the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the case, and to advise it of their positions within 30 days.

4. In a note dated April 2, 1997, the petitioner expressed willingness to initiate a process of friendly settlement. The Commission forwarded this information to the Ecuadorian State. On July 29 the State presented arguments on the admissibility and merits of the case without making

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any reference to the possibility of a friendly settlement. The petitioner sent his observations on the arguments presented by the State in a note dated November 3, 1997.

5. On November 14, 1997, the State finally replied to the Commission's offer of friendly settlement. It stated it was prepared to enter into a friendly settlement in light of the provisions of the Statute of the Administrative Legal Regime of the Executive Branch of Ecuador, whose articles 130 and 134 establish a procedure for determining the State's material and subsidiary responsibility. The Commission forwarded this reply to the petitioner, who in a note of January 21, 1998, stated for the record that the proposal was not satisfactory. In his opinion, the State had only agreed to attempt a friendly settlement of the case in ambiguous terms and based on the idea that there are legal remedies for settlement of damages. He was therefore convinced that a procedure for friendly settlement should be discarded, and requested the Commission to issue a decision on the merits and send the case to the Court.

III. FACTS

6. Víctor Rosario Congo, an Ecuadorian aged 48, was charged by the Second Criminal Judge of El Oro Province with robbery and assault in cases 202/90 and 205/90. On July 25, 1990, when those cases were under investigation, Mr. Congo was placed in a detention center, the Social Rehabilitation Center in Machala.

7. Though they have not been conclusively corroborated, there are indications that when he was incarcerated Mr. Congo behaved in a way that suggested mental disorder. On or about September 12, 1990, he was placed in an isolation cell.

8. According to the information supplied by the petitioner and corroborated or amplified by the State, on September 14, 1990, Víctor Rosario Congo was attacked by Mr. Walter Osorio, a guard at the Rehabilitation Center.

9. As reported by the then Director of the Rehabilitation Center in his log of September 29, 1990, "…guard Walter Osorio…took advantage of the depressed mental state of inmate Víctor Amable Rosario Congo. Mr. Osorio, being on duty, began to harass inmate Víctor A. Rosario Congo, I mean, he shouted questions over and over at him, which clearly made him more demented…, and even though it was he who had driven inmate Víctor Rosario Congo to a high degree of insanity, guard Osorio himself beat him with a club on the scalp, inflicting a wound that is still visible."

10. Despite the apparent severity of the wound and his emotional state, there is no record of Mr. Congo's having received any medical treatment. He was returned to the isolation cell, where he apparently remained naked and virtually incommunicado. In the aforementioned log the Center's Director admits that Mr. Congo "…is being held alone in the isolation cell because of his demented state, for he has been urinating, defecating and speaking to himself for some time."

11. On September 20, 1990, Dr. Martha Sánchez de Rodríguez, Executive Secretary of the Diocesan Commission on Human Rights, asked the judge trying the case to order a psychiatric

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evaluation of the accused. In her opinion, Víctor Rosario Congo should be pronounced unindictable and transferred to a psychiatric facility.

12. On that same date Dr. Wilmer Riofrío, a physician at the Rehabilitation Center, sent the Director a note suggesting that, in view of his state of health, Víctor Rosario Congo undergo psychiatric evaluation and treatment in a specialized care facility. This request was also submitted to the prosecuting judge.

13. On September 25, 1990, in view of the judge's failure to act, Dr. Sánchez asked the government prosecutor to intervene to speed up the proceeding. In her note she also requested an investigation be made to establish responsibility for the assault on the victim.

14. The government prosecutor commissioned Dr. María Teresa Bernal de Arévalo, the second rank detective on duty, to investigate the attack on the victim. To this end, on October 2, 1990, medical experts Rubén Santacruz Barahona, specialist in forensic medicine of the National Attorney General's Office, and Wilmer Riofrío, physician at the Rehabilitation Center, performed a forensic medical examination.

15. These medical expert's report states in its conclusions that the physical wound found on Mr. Congo's head was the result of "… a trauma produced by a hard blunt object, which has made him ill and physically incapable of work for seven days after its infliction, barring complications." Regarding his mental state, they concluded that "judging from the signs observed in the patient during the medical examination, his entire attitude conforms to the psychiatric symptoms of psychosis (insanity), whose etiology may be rooted in the experience he is now going through and could be classed as an incarceration psychosis, or Ganser's syndrome, which usually is improved greatly by a change in environment; we accordingly suggest that he be transferred to a psychiatric facility."

16. On October 8, 1990, the then Director of the Machala Social Rehabilitation Center asked the National Director of Social Rehabilitation in Quito for authorization to transfer Víctor Rosario Congo to the Men's Social Rehabilitation Center in Guayaquil for medical attention.

17. Finally, on October 23, 1990, the Second Judge of the Criminal Court sent the Director of the Rehabilitation Center a letter authorizing transfer of the alleged victim to the Lorenzo Ponce Psychiatric Hospital in the city of Guayaquil. The documentation presented by the parties shows that the transfer was carried out the following day; however, that hospital refused to admit him. From there he was taken to the Luis Vernaza Hospital, where he was also turned away. Finally, on October 25, 1990, he was taken to the Men's Social Rehabilitation Center in Guayaquil.

18. When Víctor Rosario Congo was admitted to the Men's Social Rehabilitation Center in Guayaquil he was "…in a critical state of health…" The National Directorate for Social Rehabilitation issued a medical order stating that "…the said inmate must leave urgently and under the maximum applicable security and the responsibility of the guard or guards who move him…". He was transferred due to third-degree dehydration, and it was ordered that he be taken to the emergency ward of the Luis Vernaza Hospital.

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19. Víctor Rosario Congo was taken to the Vernaza Hospital at 12 o'clock on October 25, 1990. According to Hospital records files, the patient arrived in a critically dehydrated state, and died a few hours after being admitted.

20. The report on the autopsy performed on October 27, 1990, concludes that Víctor Rosario Congo died of malnutrition, hydroelectrolitic imbalance, and heart and lung failure.

21. Guard Walter Osorio resigned shortly after the incident, and the Second Judge of the Criminal Court of El Oro closed the cases for which Víctor Rosario Congo had been placed under preventive detention.

IV. POSITIONS OF THE PARTIES

1. Allegations by the petitioner

22. The petitioner argues that the State is responsible for the wounds inflicted on Víctor Rosario Congo, the failure to give him medical attention, his isolation, and the negligence that ultimately caused his death.

23. The petitioner maintains that the State is responsible for the wounds inflicted on the alleged victim by personnel of the Detention Center. He argues that it has been proven that guard Walter Osorio struck Víctor Rosario Congo on the head, inflicting a bleeding wound.

24. He also asserts that the State did not discharge its obligation to provide medical care to the wounded person in its custody and, on the contrary, placed him in a cell where he was left in solitary confinement despite his wounds and mental state.

25. In the petitioner's view, the demise of the alleged victim cannot be described as "natural death," but was the outcome of lack of due diligence on the part of the State. The petitioner maintains that there is a causal connection between the assault on the victim, the isolation in which he was placed, and his death. It is reasonable to conclude, he argues, that the refusal to feed was a consequence of that isolation and of the lack of medical care to which the victim was subjected after he was injured on the head. In addition, Mr. Congo was suffering from a mental disorder. He concludes that the State must accept its responsibility for what was a "death while in custody."

26. The petitioner has also argued that the State failed to comply with its obligation to carry out a judicial investigation to establish the responsibility of those attacking inmate Congo and in his subsequent deterioration. He argues that the State failed to conduct a judicial investigation into facts of such a nature as to constitute a prosecutable offense, and asserts that this burden cannot be shifted to the petitioners.

27. The petitioner has also criticized certain aspects of the forensic procedures, which he has described as "negligent."

2. The State's defense

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28. The State has presented documentary evidence confirming the identity of the victim's aggressor as Walter Osorio, a guard at the Machala Social Rehabilitation Center. It has also presented information that confirms the physical and psychological damage caused by the aggression. However, it has not presented any defense in justification of the guard's actions.

29. The State has described as "perverse" the petitioner's assertion that there is a causal link between the assault on the victim on September 14, 1990, and his death on October 25 of the same year. It alleges that, according to the autopsy, Víctor Rosario Congo died of dehydration and not of his wounds.

30. As for its obligation to act with due diligence in relation to persons in its custody–particularly persons in Mr. Congo's state of health–the State has only referred to the socioeconomic situation, which, it alleges, prevents it from having psychiatric prisons and enough trained guards.

31. In regard to its duty to investigate violations of fundamental rights, the State alleges that the petitioner filed no appeal with the Court of Constitutional Guarantees to protect the victim's rights. It maintains that the complaint was presented only to the government prosecutor, who is not a member of the judiciary, which cannot, therefore, be charged with delaying justice.

32. Lastly, and in reply to the petitioner's criticisms, it defends the validity of the autopsy performed and alleges that the experts are not authorized to omit forensic procedures or falsify reports, for which they would incur severe penal sanctions.

V. ANALYSIS

A. Issues of fact

33. The facts of the case as presented by the petitioner have not been contested by the State, which has cooperated by presenting official documents that have been instrumental in establishing a number of relevant facts.

34. Thus, the petitioner and the State agree that on September 14, 1990, guard Walter Osorio assaulted inmate Víctor Rosario Congo in the Machala Rehabilitation Center, inflicting a wound on his head. They also agree that the alleged victim remained alone in a cell at that Rehabilitation Center from September 14 until his transfer to the Luis Vernaza Hospital, on October 25, where he died. Also undisputed is the fact that the supposed victim died of advanced dehydration, as emerges from the autopsy performed on him, although the petitioner, in his statement of June 6, 1996, criticized certain formal aspects of the forensic acts as performed.

35. In addition to the above considerations, the Commission considers it important to determine the state of mental health of Víctor Rosario Congo before and during the events referred in the complaint. As explained below, such determination will have an impact on the standards considered in the present case.

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36. The mental state of the victim was not evaluated until after the incident on September 14, 1990. Dr. Wilmer Riofrío established that Mr. Congo was suffering from a mental disorder on September 20, 1990, and finally the Medical Legal Report of October 2, 1990, established convincingly that he suffered from incarceration psychosis, or Ganser's syndrome.[FN2]

[FN2] Ganser's syndrome is characterized by depressive episodes and hysteria. See Dictionary of Medical Syndromes, J. B. Lippincott Company, 1991, p. 335; Haald Hampel, Claudia Berger, Norbert Muller, "A Case of Ganser's State Presenting as a Dementia Syndrom," 29 Psychopathology (1996), pp. 236-240.

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37. However, National Police report presented by the State indicated that Víctor Rosario Congo "already suffered from a mental disorder, known as Ganser's syndrome…" even before the incident on September 14, 1990. The National Police came to that conclusion after analyzing the statements of Dr. Wilmer Riofrío, inmate Trotsky Rosario Torres, and Mr. Francisco Soreano, as well as the letter of September 20, 1990, signed by Dr. Riofrío.

38. That report also suggests that Víctor Rosario Congo reportedly suffered from a mental disorder before being confined in the Machala Social Rehabilitation Center, for when he was previously in another Social Rehabilitation Center he appears to have been given valium intravenously to enable him to sleep.

39. Despite these signs, it does not emerge conclusively from the information in the file of the case that Víctor Rosario Congo was suffering from any mental disability before he was placed in preventive detention. Ecuadorian law makes provision for cases in which a mentally ill person is detained on criminal charges. In such cases the Ecuadorian Criminal Code requires the magistrate to investigate the personal background of the accused and his behavior prior to commission of the offense. When it is found that the offense was committed by a person suffering from mental illness, the competent judge must order his confinement in a psychiatric hospital.[FN3]

[FN3] Código Penal, Ejecución de Penas, Ley de Gracia, Quito, Corporación de Estudios y Publicaciones, 1994.

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40. The petitioners have not raised the question of whether Mr. Congo should have been confined in a psychiatric hospital instead of being placed in preventive detention in a rehabilitation center for common prisoners. Nor have they presented supporting evidence. Therefore, the Commission will abstain from referring to this issue.

41. In any case, it is discarded that the victim acquired the mental disorder found on October 20, 1990, as a result of the assault on him on September 14, 1990, and his subsequent solitary confinement. However such acts could have constituted the factor that fatally aggravated the inmate's physical and mental agony.

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42. The United Nations has defined a person with mental disability as one who in the course of his/her disability is unable to care for his/her own person or affairs, and requires care, treatment or control for his/her own protection or that of others or of the community.[FN4] It has been established that Víctor Rosario Congo fitted into this category. The Commission concludes that, for the purposes of the present case, Víctor Rosario Congo must be regarded as mentally disabled.

[FN4] UN Sub Commission on Prevention of Discrimination and Protection of Minorities, Erica Irene Daes. Rapporteur, Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill Health or Suffering from Mental Disorder, U..N. doc. E/CN.4/Sub.2/1983/17, p. 43.

B. Issues of law

43. This case has been presented by the petitioner without expressly alleging the violation of specific provisions of the Convention. Nor have the observations made by the State been based on interpretation of the applicable provisions of the Convention.

44. Therefore the Commission, based on the principle of jura novit curia, shall determine the provisions of the American Convention that may have been violated in light of the facts, undisputed in this case, and of the allegations of the parties.

45. In the present case the Commission deems it pertinent to assess whether the State has complied with its obligations under the Convention to respect and protect the rights to humane treatment, life, and judicial protection.

46. Before proceeding to an analysis of the substantive issues, it must be considered whether the acts and omissions committed in the present case, and which are alleged to have resulted in the violation of the fundamental rights established in the Convention, are attributable to the State on the basis that they were committed against a person in its custody.

47. Article 1(1) of the Convention establishes that the States Parties must ensure the free and full exercise of the rights protected to "…all persons subject to their jurisdiction…" The persons held in a penitentiary institution, such as the Machala Rehabilitation Center, are under the direct control of the State, which has the responsibility to protect their mental and moral integrity.

48. In its Judgment on the case Neira Alegría et al., the Inter-American Court established that, in the terms of Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.[FN5]

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[FN5] I/A Court HR Neira Alegría et al. Case, Judgement of January 19, 1995, par. 60. See also Report No. 28/96, Case 11.297, Guatemala, Annual Report of the IACHR 1996.
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49. As for the international responsibility that the State could incur through its agents, the Inter-American Court has held that any impairment of the 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.[FN6]

[FN6] I/A Court HR Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 164.
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50. In the present case, the alleged victim was held in preventive detention while his trial for robbery was being prepared. Hence the Commission notes that, if violations of the fundamental rights of the inmate were committed, they would be imputable to the State in its capacity as guarantor.

1. Right to humane treatment

51. It has been established that the alleged victim was subjected to a physical assault that resulted in a bleeding wound in his head. It has not been established that he was given the medical care needed to alleviate his physical wounds or his mental state. It has been confirmed that he remained in isolation, and without the assistance he needed in cleaning and feeding himself, given the proven poor state of his health.

52. It is to be determined, then, whether those acts and omissions constitute a violation of Article 5 of the American Convention, which provides that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

53. The Commission deems it pertinent to apply special standards to the determination of whether the provisions of the Convention have been complied with in cases involving persons suffering from mental illnesses. This has also been the practice of the European Court of Human Rights.[FN7]

[FN7] "The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with…" Euro Court HR Herczegfalvy v. Austria, September 24, 1994, para. 82.

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54. In this case the person whose physical, mental and moral integrity was allegedly violated, suffered from a mental disability. Therefore, the Commission considers that in the present case the guarantees established in article 5 of the American Convention must be interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.[FN8] These principles were adopted by the United Nations General Assembly as a guide to interpretation in matters of protection of the human rights of persons with mental disabilities, which this body regards as a particularly vulnerable group.

[FN8] The UN Principles for the Protection of Persons with Mental Illness are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These Principles serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems. Mental Health Principle 23 establishes that each State must adopt the legislative, judicial, administrative, educational, and other measures that may be necessary to implement them. Principles for Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.. G.A. Res 119, UN GAOR, Session 460, Supp. No. 49, Annex, UN doc. A/46/49 (1991), pp. 188-192. See Eric Rosenthal and Leonard S. Rubenstein, International Human Rights Advocacy under the Principles for the Protection of Persons with Mental Illness. Int'l J.L. & Psychiatry 257, 273 (1993). See also Derechos Humanos y Salud Mental en el Uruguay, Mental Disability Rights International, The American University, Washington, D.C. (1995), p. 4.

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a. Solitary confinement as cruel and inhuman treatment

55. The Commission must consider first whether the isolation to which Víctor Rosario Congo was subjected constitutes a violation of Article 5 of the American Convention. According to the report of the Guayas Provincial Police Headquarters (Communication Nº 6118), supplied by the State, Mr. Congo was moved to an isolation cell on September 12, 1990, apparently owing to his mental state. This means that the victim remained in virtual isolation for approximately 40 days until he died on October 25, 1990.

56. The Inter-American Court referred to the effects of solitary confinement and the holding of prisoners incommunicado. It has established that keeping a person in a small, isolated cell constitutes inhuman and degrading treatment, which justifies provisional measures to preserve his integrity.[FN9]

[FN9] I/A Court HR Resolution of July 2, 1996. Provisional Measures requested by the Inter-American Commission on Human Rights in respect of Peru, Case of Loayza Tamayo. In this Resolution the Court decided that provisional measures were called for because the victim was "subjected to isolation and deprived of sunlight, which facts in themselves constitute cruel and inhuman forms of treatment."

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57. In the case A. vs. United Kingdom,[FN10] the European Commission considered the case of a patient held in isolation in a psychiatric hospital for five weeks without clothing, toilet facilities, furniture or ventilation, in the light of the standards on humane treatment established in the European Convention on Human Rights. The case was closed with a friendly settlement under which the United Kingdom undertook to reform the law on mental health and to assure the provision of clothing, mattresses, portable latrines and toilet paper to inmates.

[FN10] A. vs. United Kingdom, Application No. 6840/74, 3 E.H.R.R. 131 (1980).

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58. The Commission is of the view that isolation can in itself constitute inhumane treatment. Moreover, when the person kept in isolation in a penitentiary institution has a mental disability, this could involve an even more serious violation of the State's obligation to protect the physical, mental and moral integrity of persons held under its custody.

59. In this case, the Commission considers that the solitary confinement to which Mr. Congo was subjected constitutes inhuman and degrading treatment in the terms of Article 5(2) of the American Convention. This violation is aggravated by the fact that he was left in isolation unable to satisfy his basic needs. Consequently, the Ecuadorian State violated the right of Víctor Rosario Congo to "be treated with respect for the inherent dignity of the human person."

b. The events of September 14, 1990

60. As has already been established, on September 14, 1990, a guard in the Rehabilitation Center assaulted inmate Víctor Rosario Congo for no apparent reason. The guard, identified as Walter Osorio, was acting as a public authority in the detention center, and hence his actions are imputable to the State.

61. The Commission has established that the agents of the State charged with maintenance of order in jails have the duty to treat humanely the prisoners in their custody.[FN11]

[FN11] Report No. 55/97, Case No. 11.137, Argentina, Annual Report of the IACHR 1997, par. 195.

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62. The Commission considers that the State is responsible for the physical assault committed by one of its agents–guard Osorio–on Mr. Congo. The events of September 14, 1990, constitute cruel, inhuman and degrading treatment, and a grave violation of the victim's right to respect for his physical, mental, and moral integrity.

c. The duty to ensure the physical, mental, and moral integrity of persons suffering from mental illness

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63. On September 20, 1990, after the injury had been inflicted, Dr. Wilmer Riofrío--a physician at the Rehabilitation Center--determined that the inmate's mental state required specialized medical care.[FN12]

[FN12] Persons with Ganser's syndrome require, among other things, immediate hospitalization to alleviate their anxiety and place them in an environment relatively free of pressures, in which mental distress can be restored to balance or reduced to bearable levels and the symptoms can improve. See Hampel, Berger and Muller, op. cit., p. 240.

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64. However, detection of Mr. Congo's mental suffering did not result in his immediate removal to a health care facility not even the conditions of his detention were improved. The "Report to the Chief of the Guayas Provincial Judicial Police," submitted by the State, states that "though Víctor Rosario Congo… was injured and suffering from temporal and spatial disorientation, those in charge of him continued to keep him in an isolation cell without the treatment required in these cases, which constitutes negligence."

65. In its Report No. 28/96[FN13] the Commission found that retaining in custody, and without medical treatment, a person who was suffering from cerebral edema and cholera constituted a violation of physical, mental and moral integrity and of the prohibition on the infliction of inhuman, cruel or degrading treatment, established in Article 5 of the American Convention.

[FN13] Report Nº 28/96, Case 11.297, Guatemala, Annual Report of the IACHR 1996. See also Res. Nº 52/82, Case 5154, Nicaragua, Annual Report of the IACHR 1982-1983.

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66. The European Commission has established that the incarceration of a mentally disabled person under deplorable conditions and without medical treatment may be considered as inhuman or degrading treatment.[FN14] In the case Herczegfalvy vs. Austria it reiterated that failure to provide medical treatment to prisoners or mental patients can constitute a violation of the provisions of the European Convention on Human Rights, regarding the infliction of inhuman or degrading treatment or punishment.[FN15]

[FN14] Ashingdane vs. United Kingdom. Application Nº 8225/78, Series A Nº 93,6 E.H.R.R. 50 (1984) "…Other provisions of the Convention, Art. 3 (the prohibition on torture, inhuman or degrading treatment, or punishment) and Art. 18 (the prohibition on using permitted Convention restrictions for ulterior purposes) might be in issue were a mental health patient to be incarcerated in appalling conditions with no consideration being given to his treatment…"

[FN15] Herczegfalvy vs. Austria, par. 242 "The Commission has repeatedly considered the medical treatment of prisoners or mental health patients under Article 3 of the Convention. Failure to provide adequate medical treatment may be contrary to this provision…"

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67. The Commission considers that a violation of the right to physical integrity is even more serious in the case of a person held in preventive detention, suffering a mental disease, and therefore in the custody of the State in a particularly vulnerable position.

68. The Commission concludes from the foregoing that the State is responsible for not taking the necessary measures to protect the physical, mental and moral integrity of the victim. It is not clear from the positions of the parties whether his condition was investigated promptly or belatedly by the authorities; in any case, once that condition was established, the State failed to provide the medical treatment needed to ensure his physical integrity.

2. The right to life

69. Article 4(1) of the American Convention establishes that:

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

70. On September 20, 1990, the Director of the Machala Social Rehabilitation Center, Alberto Soreano, asked the Second Judge of the Criminal Court of El Oro for the victim to be moved to a psychiatric care facility. However, an attempt to move him was only made on October 24 and it was unsuccessful. The move was carried out the next day, a few hours before Mr. Congo died.

71. The State has alleged that it is not responsible for the death of Víctor Rosario Congo, and has described as "perverse" the alleged connection between the events on September 14, 1990, and the inmate's death.

72. The Commission must make clear that, the assertions of the State notwithstanding, a connection between the violation of the victim's physical integrity on September 14, 1990, the worsening of his mental condition and his death appears from the evidence provided by Ecuador itself. The National Police report of May 1, 1995, cites the statements of the former Director of the Machala Social Rehabilitation Center to the effect that "…the blow dealt with his club by guard Osorio to the aforementioned inmate could have impaired his mental state, aggravated his illness a little more, and ultimately caused his death…"

73. The State's observations affirm, and the autopsy confirms, that the victim did not die of his injury but of the dehydration he suffered during the approximately forty days he remained in isolation without food or water. It has not been shown, however, that the necessary measures were taken to protect the personal integrity of an inmate who exhibited physical wounds which, though not grave, required attention, and who, owing to his mental state, was in no position to look after himself.

74. The measures needed for his survival consisted in medical care to heal his physical injuries, and such vital ministrations as cleansing, food, and psychological attention to treat his depression and the psychosis characteristic of Ganser's syndrome.

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75. As revealed by the information supplied by the State, the victim was held in isolation for more than forty days practically up to the day of his death; that after being subjected to physical and moral assault by staff of the Rehabilitation Center, no medical care was given to his wounds, as emerges from the examination performed on him on October 2, 1990; and that, though he was diagnosed as mentally ill, he was kept in isolation and his basic physical needs were disregarded in the knowledge that he was in no condition to care for himself.

76. The State has alleged that structural obstacles prevent it at present from providing medical and psychiatric treatment to persons in its custody. It requests that this structural situation be taken into account in arriving at a decision in this case.

77. The Ecuadorian penitentiary system is presumably not up to the international standards of medical and psychiatric care. Mental Health Principle 20.1 and 20.2 state that "persons serving prison sentences for criminal offenses or arrested in the course of criminal proceedings brought against them, and who are found to be or suspected of suffering from mental illness… must receive the best available mental health care…" The Minimum Standards for the Treatment of Prisoners[FN16] prescribes that mentally disabled persons shall not be placed in prisons. Arrangements are to be made to move them as quickly as possible to facilities for the mentally ill, and in the event that they must remain in prison, they shall remain under the special oversight of a physician.[FN17]

[FN16] Reglas Mínimas para el Tratamiento de los Reclusos, title B Reclusos Alienados y Enfermos Mentales (Insane Prisoners and the Mentally Ill), provision 82.1.
[FN17] Ibidem, provision 82.3.

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78. In its Report on the Human Rights Situation in Ecuador the Commission noted that the State's psychiatric hospitals do not admit inmates, apparently because of the tension and fear they may engender in other patients.[FN18] This situation poses a serious threat to the physical and mental integrity and the lives of the persons with mental disabilities in that situation. In this particular case, the threat materialized and led to the death of a person being held under preventive detention.

[FN18] IACHR Report on the Human Rights Situation in Ecuador (1997) OEA/Ser.L/V/II/96 Doc. 11 rev. 1, pp. 63 and 64.

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79. However, apart from the need for the State to correct this deficiency, the Commission found on its on-site visit to Ecuador that the country does have hospitals that can give out-patient care to inmates with health problems.[FN19]

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[FN19] These are the Lorenzo Ponce hospital in Guayaquil, and the San Lázaro and Julio Endara hospitals in Quito. Ibidem.

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80. In any case, the international standards applicable establish that every detention center shall possess the services of at least one qualified physician, who must possess some psychiatric knowledge. This physician must be responsible for the physical and mental health of the inmates and must see those with health problems every day as well as those drawn to his attention.[FN20]

[FN20] Reglas Minimas para el Tratamiento de los Reclusos, provisions 22 and 25.

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81. In brief, the fact that the State has no special facilities for the admission of prisoners with mental illness does not exempt it from the obligation to provide medical care to the persons in its custody.

82. The European Court of Human Rights has established that the state of health of a victim is an important factor in determining whether they have been subjected to inhumane or degrading punishment or treatment.[FN21] The Commission must take into consideration that the death of the victim occurred as a consequence of dehydration and malnutrition. Persons with mental disability are not able to look after themselves and require care, treatment and supervision for their own protection. In this case, therefore, the agents of the State charged with the personal safety of Mr. Congo were not in a position to assume that the inmate was capable of feeding and caring for himself. The fact that the supposed victim died as a result of his dehydration and malnutrition reveals that the State failed in its duty to do what was in its power to keep him alive, given his mental and physical disorders. The petitioners have not argued that Mr. Congo was deliberately deprived of water and food, but the State has not shown that it took the measures incumbent on it to ensure that the alleged victim would be properly fed during the time of his isolation. Nor does the fact that the inmate may have displayed antisocial behavior–a symptom of his disorder in any case–exempt the State from taking such measures as are in its power to keep him alive. As held by the European Commission in the case of Dhoest vs. Belgium,[FN22] the obligation of authorities to watch continually over the health and welfare of persons with mental disabilities extends to the cases of prisoners who are uncooperative. Therefore, given the causes of his death, and apart from having omitted to provide him with medical and psychiatric care, the State neglected its obligation to protect the life of inmate Víctor Rosario Congo.

[FN21] Ireland vs. United Kingdom, Judgment of the European Court of Human Rights, January 18, 1978, Series A, No. 25 (1979-80) 3 EHRR 25, paragraph 162.
[FN22] Dhoest vs. Belgium, App. No. 10448-83, 12 E.H.R.R. 97 (1988), par. 121.

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83. In its Report Nº 28/96,[FN23] the Commission established that whenever a person is detained and unable to contact his next of kin, a lawyer or personal physician, the State must be

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considered to be in complete control of his life and physical integrity. In such circumstances, any omission by the State violate its obligation to ensure the right to life and physical integrity of the inmate.

[FN23] Report Nº 28/96, Case 11.297, Guatemala, Annual Report of the IACHR 1996.
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84. On the basis of the foregoing, the Commission concludes that in the present case the State failed to take the measures in its power to ensure the right to life of a person who, partly because of his state of health and in part owing to injuries inflicted on him by a State agent, was defenseless, isolated and under its control. Therefore, Ecuador has violated the right to life of Mr. Congo, as enshrined in Article 4 of the American Convention, and omitted to discharge its obligations under Article 1(1) thereof.

3. Right to judicial protection

85. The Commission will now examine whether the obligation to provide judicial protection was complied with in the present case. This issue was raised in the admissibility stage and reserved for consideration with the merits of the case.[FN24]

[FN24] Report No. 12/97, Ecuador, Víctor Rosario Congo, Annual Report of the IACHR 1996, para. 47.
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86. Article 25(1) of the American Convention establishes that:

Everyone has the right to … effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized in the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

87. As has already mentioned, on September 20, 1990, a psychiatric evaluation of Mr. Congo and his removal to a care facility was requested to the judge of the case, the Second Judge of the Criminal Court of El Oro. On September 28, 1990, in view of that magistrate's inaction, the government prosecutor of that jurisdiction was asked to open an investigation into the responsibility for the assault on the prisoner.

88. At the time of writing the Commission has neither been informed nor knows from any other source that the requested actions were taken. According to the information supplied by the parties, guard Walter Osorio–who allegedly inflicted the wounds–resigned from his post shortly after the incident.

89. The State alleges in its own defense that the complaint had been presented to the government prosecutor of El Oro, who does not represent the judicial branch, which is the body

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presumably responsible for the unwarranted delay in opening the investigation. In reply, the petitioner has maintained that requested judicial inquiries must be pursued automatically once the judicial authority is in receipt of the appropriate advice.

90. The Commission notes that the Code of Criminal Procedure of Ecuador establishes that the offense of bodily injury is prosecutable ex officio. Article 21 of that Code provides that "on the basis of received information, the Office of the Attorney General (Ministerio Público) shall advise the competent judges to open criminal proceedings."

91. The Commission considers, therefore, that Víctor Rosario Congo has been the victim of an offense that is subject to investigation ex officio, and that the office of the attorney general, embodied in the person of the El Oro prosecutor, was duly apprised of the events of September 14, 1990, and of the state of Mr. Congo's health.

92. The State argues that the failure to provide judicial protection in the instant case is the petitioner's responsibility, who did not apply to the Constitutional Tribunal for protection of the fundamental rights of Víctor Rosario Congo.

93. The Commission, as established in its case-law,[FN25] considers that when an offense prosecutable ex officio is committed, the State has the obligation to institute a process and prosecute the responsible through to its ultimate conclusion. In these cases neither the victim nor his/her relatives can be required to undertake the task of exhausting domestic remedies. It is up to the State to investigate the facts and punish those responsible as part of its obligation to preserve public order.

[FN25] Report Nº 52/97, Case 11218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paragraphs 96 and 97. The Commission has also stated that "the State has an international obligation to investigate, clarify and redress any violation of human rights which give rise to a complaint and to punish those responsible, in accordance with Articles 1(1), 8 and 25 of the American Convention. In this case, in particular, the State had the obligation to identify those responsible for the violations of the right to personal integrity which gave rise to the petitioner's complaints…" Report 55/97, par. 392.

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94. In the words of the Inter-American Court, the obligation to investigate "…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… without an effective search for the truth by the government."[FN26]

[FN26] I/A Court HR, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 177.

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95. The investigation, trial and punishment of human rights perpetrators is an obligation that the State is in no position to delegate. Unlike private persons, public officials are legally bound

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to prosecute ex officio all indictable offenses that come to their knowledge. This is precisely why in most systems the State has a monopoly on criminal proceedings, and in judicial systems that give legal standing to the victim or his family, it is not obligatory that the actions contemplated be taken, and they do not supplant action by the State.[FN27]

[FN27] Ibidem.

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96. In the instant case, the State authorities were neglectful in their obligation to investigate the events of September 14, 1990, and those that followed, culminating in the death of Víctor Rosario Congo, in order to establish the responsibility of the parties involved and take appropriate action.

97. The Commission concludes that the State has violated the right to judicial protection enshrined in Article 25(1) in conjunction with Article 1 of the Convention, as no judicial proceedings have been opened to investigate and establish the responsibilities for the injuries to and death of Víctor Rosario Congo.

VI. ARTICLE 50 REPORT AND CONSIDERATIONS ON COMPIANCE WITH THE RECOMMENDATIONS SET FORTH THEREIN

98. On September 29, 1998, during its 100° Regular Session, the Commission approved Report 51/98 according to Article 50 of the American Convention. The Report concluded that the State was responsible for the violation of the rights to life (Article 4), to humane treatment (Article 5(1) (2)), and to judicial protection (Article 25), set forth in the American Convention, in conjunction with the obligation established in Article 1(1) thereof. The Commission recommended the State to: 1) Conduct a serious, impartial and prompt investigation to identify, try and punish the persons responsible for the violations specified in the conclusions of this report. 2) Take appropriate measures to compensate the family members of Víctor Rosario Congo. 3) Provide medical and psychiatric care for persons suffering from mental illness and confined in penitentiary facilities. 4) Assign to the health services of the penitentiary system specialists able to identify psychiatric disorders that can affect the lives and the physical, mental and moral integrity of those confined in it. Report 51/98 was notified to the State on October 20 1998 with a three-month period to present information regarding compliance with the above recommendations.

99. On February 24, 1999, the State, extemporaneously, informed the Commission that:

The Ecuadorian State, through the General Attorney, has initiated direct conversations with the petitioner, the Comisión Ecuménica de Derechos Humanos, with the purpose of concluding an agreement on compliance with Report 51/98, issued by the Inter-American Commission on Human Rights.

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The petitioner has expressed that they have failed to locate the victim's family. Therefore, the Ecuadorian State is still waiting for them to contact family members in order to finalize the negotiations.

It must be noted that the General Attorneys Office and the petitioner, the Comisión Ecuménica de Derechos Humanos, have agreed the possible terms of compliance with the Report.[FN28]

The State requested the Commission to suspend the processing of the case until the petitioner could contact the victim's family members in order to sign the agreement.

[FN28] Communication Nº 4-2-47/99 of the Permanent Mission of Ecuador to the OAS, dated February 24, 1999.

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100. The Commission takes note of the encouraging measures taken by the Ecuadorian State to comply with the Commission's recommendations. However, the terms of the future agreement have not been communicated to the Commission and, as it appears from the communication presented by the State, the said agreement has not been effectively concluded. Therefore, the Commission must adopt the decision that will contribute to protect human rights in the most effective manner which, in this case, is that of continuing with the proceeding provided for in Article 51 of the American Convention.

VII. CONCLUSIONS

101. Based on the above considerations of fact and law, the Commission finds that the recommendations issued in Report 51/98 have yet to be complied with, and therefore ratifies its conclusion that the Ecuadorian State is responsible for the violation of the rights to life (Article 4), to humane treatment (Article 5(1) (2)), and to judicial protection (Article 25), set forth in the American Convention, in conjunction with the obligation established in Article 1(1) thereof.

VIII. RECOMMENDATIONS

102. On the basis of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

103. To reiterate its recommendations to the State of Ecuador that it:

1. Conduct a serious, impartial and prompt investigation to identify, try and punish the persons responsible for the violations specified in the conclusions of this report.
2. Take appropriate measures to compensate the family members of Víctor Rosario Congo.
3. Provide medical and psychiatric care for persons suffering from mental illness and confined in penitentiary facilities.

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4. Assign to the health services of the penitentiary system specialists able to identify psychiatric disorders that can affect the lives and the physical, mental and moral integrity of those confined in it.

IX. PUBLICATION

104. On March 10, 1999, the Commission transmitted Report 29/99 adopted in the present case (see chapters I to VII supra) to the State pursuant to Article 51(1) and (2) of the American Convention, and fixed a period of twenty days to adopt all necessary measures to comply with the recommendations at issue.

105. On April 8, 1999, the Commission was informed that the State and sister Elsie Monge, Executive Director of CEDHU and representative of the victim, had reached an agreement on compliance with Report 29/99. It must be noted that at the date of conclusion of the agreement, all efforts to locate the victim's family members were still fruitless. Pursuant to this agreement, the State acknowledges its international responsibility for the violations of Articles 4, 5(1), 5(2), 25 and 1(1) of the American Convention and agrees to "repair the damage caused to the victim".

106. The State undertook to pay compensation in the amount of US$30,000 (thirty thousand US dollars), tax fee, with the exception of the duties imposed on capital circulation, for the moral and material damages suffered by the victim. The State formally undertook to take all necessary steps to make effective payment within 90 days from the date of signature of the agreement. The State also acceded to add to the amount of any arrears the corresponding interest calculated according to the rate employed by the three leading banking institutions in Ecuador.

107. The parties agreed to establish a trust fund for the benefit of Víctor Rosario Congo's family and to that effect they shall deposit the amount agreed upon in a financial institution. Should the parties fail to locate the victim's heirs within six months, the compensation will be given to an institution, to be designated by CEDHU, dedicated to the mentally ill at Quito prisons.

108. Regarding the prosecution of the State agents responsible for the violations found, the General Attorney formally undertook to "urge the competent public or private organs to produce information leading to the prosecution of such persons."

109. The State has notified the conclusion and the terms of this agreement to the Commission for its "entire approval and ratification." It has also requested that the Commission supervise compliance with its terms and, to that effect, has undertaken to report every three months.

110. The Commission considers that the agreement above described constitutes a formal undertaking to comply with the recommendations made in Report 29/99 and that its terms are compatible with such Report and with the object and purpose of the American Convention. The Commission sincerely welcomes the Republic of Ecuador's commitment to comply with the recommendations issued.

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111. Therefore, the Commission takes note of the agreement reached between the Ecuadorian State and the representative of the victim's interests, Sister Elsie Monge from CEDHU, and approves its terms. In view of the foregoing considerations, and in accordance with Article 51(3) of the American Convention and Article 48 of its Regulations, the Commission decides to make the present Report public and include it in its Annual Report to the General Assembly of the OAS. Pursuant to its mandate, the Commission shall continue evaluating the measures adopted by the Ecuadorian State regarding all the recommendations included in paragraph 102 until they have been fully complied with.

Approved by the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C. on the 13th day of the month of April 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman; Commissioners Alvaro Tirado Mejía and Jean Joseph Exume.