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Decided by: Chairman: Professor Robert K. Goldman;
First Vice-Chairman: Dr. Helio Bicudo;
Second-Vice Chairman: Dean Claudio Grossman;
Members: Prof. Carlos Ayala Corao, Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.
Dated: 13 April 1999
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Represented by: APPLICANT: Socorro Juridico Cristiano "Arzobispo Oscar Romero"
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I. BACKGROUND

1. On July 15, 1988, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR") received a petition from Socorro Jurídico Cristiano "Arzobispo Oscar Romero" [Archbishop Oscar Romero Christian Legal Aid Service] against the Republic of El Salvador (hereinafter "the State," "The Salvadorian State," or "El Salvador")^[FN1] regarding the extrajudicial execution of Víctor Hernández Vásquez by members of the Artillery Brigade in the department of La Libertad, where he was in military service. According to the petitioners, this execution, performed by agents of the State, violated the right to life and personal integrity of Mr. Hernández Vásquez, given the fact that when his body was turned over to members of his family it showed signs that he had been hanged and there were bruises and burns over various parts of the body.

[FN1] Representation of the victim was subsequently assumed by José Simeón Cañas Central American University (IDHUCA), which took over all the cases that the Christian Legal Aid Service had been handling with the Commission (see communication of José Simeón Cañas Central American University (IDHUCA) dated November 18, 1994, and signed by the Coordinator of the Christian Legal Aid Service and the Executive Director of IDHUCA).

II. POSITION OF THE PARTIES

A. Facts denounced

In their denunciation, the petitioners allege, inter alia, that:

2. Víctor Hernández Vásquez died while serving in the Artillery Brigade based in the department of La Libertad, where he was in military service. The presumed victim had been held incommunicado on the base of said brigade for a week prior to June 29, 1988, the date when his body was turned over to his family.
3. When the soldiers in the Artillery Brigade told about the death of Mr. Hernández Vásquez, they gave contradictory versions with regard to the cause. Some of them said that he had died in a confrontation with guerrilla forces, while others said that he had committed suicide by hanging himself, and still others said that he had shot himself to death.
4. At the time his body was turned over, the soldiers gave strict orders to his family not to open the coffin, saying that it had already been prepared for burial. However, the victim's brother did open the coffin, and he discovered that the body showed signs of hanging, bruises on various parts, and burns on the abdomen, presumably caused by cigarettes.
5. The Justice of the Peace of San Juan de Opico was asked to perform an autopsy, but the request was denied, with the explanation that such an examination had already been performed at the base of the Artillery Brigade and that the cause of death had been found to be suicide.

B. Response of the State

In its response,[FN2] the State indicated, inter alia, that:

[FN2] Document dated June 22, 1989, pp. 10-11.

6. Delegates of the Commission on Human Rights had conducted a detailed review of Case No. 127/88, which had been opened in the San Juan de Opico Court of First Instance, department of La Libertad, for the purpose of investigating the death of Mr. Hernández Vásquez.
7. In the course of its proceedings, the Commission had heard statements by witnesses, victims, etc., and its review had not contributed any information that might serve to shed light on the facts.
8. The case was not closed and the judicial investigation was still pending.

C. Observations of the petitioner

In its written remarks,[FN3] the petitioner stated, inter alia, the following:

[FN3] Document dated October 10 , 1989, received on October 12 of the same year.

9. More than a year after the death of Mr. Hernández Vásquez, the mere review of Case No. 127/88 by the delegates of the (governmental) Commission on Human Rights was not sufficient indicative [sic] of effective commitment on the part of the State to discover the true facts.

10. No additional measures had been taken, and neither the Attorney General nor the Prosecutor for Human Rights had interceded in the case.

11. The incapacity of the Salvadorian judiciary in cases of this type was clear: the postmortem inquest had been limited to an external review of the body, and the coroner's report had not taken into account the official version of the events, either to confirm or to discredit it.

12. The State insisted that the investigation was still open and that no additional information had been collected that might shed light on the case. According to the petitioners, this demonstrated either incapacity or negligence on the part of the responsible tribunal, since the only action that had been carried out was to take statements from the mother of the victim and two witnesses, i.e., the soldiers guarding a cell where Mr. Hernández Vásquez had been detained.

D. Final comments of the State[FN4]

[FN4] Final Comments of the State, dated September 24, 1993, folios 30-32.

13. The State described in detail the steps that had been taken by the Office of the Justice of the Peace (Court of First Instance) in the city of San Juan Opico, Department of La Libertad, which included the following:

Folio 1 gives the opening summary of the case, which in its essential part says: "The Office of the Justice of the Peace of San Juan de Opico, at eighteen hours, thirty minutes, on the twenty-seventh day of June of the year nineteen hundred and eighty-eight, having learned from a telephone call that José Víctor Hernández Vásquez had been found at the Artillery Brigade in the canton of San Nicolás los Encuentros, in this jurisdiction, formed a team consisting of the undersigned Justice of the Peace, accompanied by his recording secretary and the coroner on duty at the time, for the purpose of performing the inquest required by law." The same folio contains the report of the inspection, which says, in essence: "On the base of the Artillery Brigade in the canton of San Nicolás los Encuentros, jurisdiction of San Juan Opico, at nineteen hundred hours on June 27, 1988, the undersigned Justice of the Peace, recording secretary, and coroner proceeded to perform the inquest, and the following was found: In the interior of Cell No. 5, hanging from a rope made from the cloth of a poncho and tied at the neck, was the body of Víctor Hernández Vásquez, 22 years of age, dressed only in his underwear. The order was given to lower the body, which, upon careful examination, was found to have only one laceration on the left knee and no other signs of violence elsewhere on the body. According to the finding of the coroner, he died as a result of asphyxiation from hanging. The corpse was turned over to Major Guillermo Antonio Ramírez Valiente, who, upon being questioned, stated that the victim had been detained and was under investigation, and that on June 27, 1988, in the course of the

afternoon, he was found dead by soldiers Pablo Sánchez Zavaleta and Omar Wilfredo Martínez, both of them serving in the same brigade. No one was observed in the immediate vicinity."

Folio 2 contains the report of the coroner's inquest performed in San Juan Opico at 19:15 hours on the twenty-seventh day of June of the year nineteen hundred eighty-eight, in which the body of José Víctor Hernández Vásquez, 22 years of age, was examined and the cause of death was determined to have been asphyxiation from hanging, with one laceration observed, in addition, on the left knee.

Folio 6 contains the statement of witness Omar Wilfredo Martínez Aquino, 22 years of age, a laborer, resident of the canton of San Nicolás los Encuentros, given at the Office of the San Juan Opico Justice of the Peace at 9:00 hours on July 9, 1988, which says: "he had been performing military service in the Artillery Brigade, and on the 27th day of last month, while on duty at said base, together with his fellow soldier Pablo Sánchez Zavaleta, he had taken supper to José Víctor Hernández Vásquez, who was detained in Cell No. 5; upon reaching the cell they knocked on the door and, when there was no answer, opened the door with a key they had in their possession and found him hanging from a rope, which was anchored to a beam at one end and tied around his neck at the other, already dead, which they reported to their superior officer."

Folio 7 contains the statement given at the same time and on the same day as that of the previous witness by Pablo Sánchez Zavaleta, 20 years of age, laborer, resident of the canton of San Nicolás los Encuentros, where he was performing military service in the Artillery Brigade, and that on June 27, 1988, while he was on guard duty with fellow soldier Omar Wilfredo Martínez, when it came time to take supper to soldier Víctor Hernández Vásquez, who was being detained in Cell No. 5, upon knocking at the door they saw that he was not answering, and they therefore opened the door with a key they had in their possession and found him hanging from a rope anchored to a beam at one end and tied around his neck at the other.

14. Given these antecedents, the State requested the file on the case, inasmuch as the corresponding investigation had been carried out; statements had been taken from the witnesses who found the body of Víctor Hernández Vásquez; a coroner's postmortem examination had been performed; no signs of torture had been found; and it had been determined that the cause of death was asphyxiation.

E. Additional information presented by the parties

15. On October 8, 1993, the State submitted a certificate which had been issued on September 24, 1993, by the Judge of the First Instance in the San Juan de Opico Court District, which read as follows:

Under entry number one hundred twenty seven of the year nineteen hundred and eighty-eight, a report is on file in this Court on [the steps taken to] investigate the death of José Víctor Hernández Vásquez, which was recorded with the Office of the Justice of the Peace of this city at 18:30 hours on the twenty-seventh day of June of the year nineteen hundred and eighty-eight, initially reported in a telephone call from the Artillery Brigade in that city, an event which occurred on the base of the Artillery Brigade located in the canton of San Nicolás los

Encuentros, in this jurisdiction, on the twenty-seventh day of June of the year nineteen hundred and eighty-eight; the offended parties being Marcelina Vásquez de Hernández and Delfino Hernández Nieto, parents of the deceased; the last action in the proceedings being taken at 12:00 hours on the fourteenth day of March of the year nineteen hundred and ninety, in which, because to date no person had been mentioned as author of the crime, an order was given to close the case.

16. On February 15, 1995, the petitioners indicated that in their files it was stated that, despite the fact that the body had been delivered in a sealed coffin to the mother of the victim, the Salvadorian Commission on Human Rights (CDHES) had conducted an inspection of the body and had found signs of torture, as proof of which they attached a photograph of the body of the victim.

17. In the same communication the petitioners reported that, subsequent to the death of Víctor Hernández Vásquez, his mother, María Carmen Hernández, had gone to the artillery base to claim indemnization and that on that occasion she had been shown a list of her five children who were being investigated as suspected members of guerrilla forces. Among them was the victim. According to the petitioners, the mother of the victim was afraid for her personal safety and that of her entire family.

18. The petitioners presented copy of a statement that had been given to the Salvadorian Commission on Human Rights (CDHES) on July 6, 1988, by María del Carmen Hernández, sister of the victim, in which the foregoing was confirmed. According to the statement, the captain of "the troops of the army of the Armed Forces" had told the younger sister, who was being characterized as a guerrilla informant: "They have all of them by their beards, because if it is true that they are collaborating with the guerrilla forces, it's too bad for them." The declarant presented this denunciation because she feared for her personal integrity and that of her family.[FN5]

[FN5] On page 46.

19. The petitioners indicated that the declaration of the witnesses cannot be considered fully reliable evidence because they are serving in the Artillery Brigade: they are sworn to obedience, and statements of this kind lack objectivity.

20. In light of all of the foregoing, the petitioners stated that the cause of death of Mr. Vásquez was not suicide but rather that it had been a typical case of arbitrary execution for political reasons, taking into account the times when the event occurred.

21. On October 6, 1997, El Salvador, at the request of the Commission, submitted information for the purpose of updating its previous file and confirmed that so far no criminal responsibility had been assigned to anyone and that, as a result, the case had been closed, but without precluding the possibility that it could be reopened in the future in the event that the appearance of new evidence made it necessary.

III. PROCEEDING BEFORE THE COMMISSION

22. On July 15, 1988, the denunciation in question was received in the offices of the Commission, and on August 15, 1988, it was transmitted to the State, which was given 90 days in which to respond to it.

23. On February 15, 1989, the Commission reiterated its request.

24. On June 16, 1989, the Salvadorian State responded to the request, reporting that an investigation of the case in question was being conducted by the Court of the First Instance in San Juan de Opico.

25. On October 10, 1989, the petitioners submitted their observations on the response of the Salvadorian State, which were sent to the State on January 29, 1990, at which time the State was given 30 days in which to prepare any final comments that it considered pertinent.

26. The Commission reiterated its request for comments and information from the Salvadorian State on November 9, 1990, but the State did not respond.

27. In a note dated July 28, 1993, the Commission reiterated its request, warning that it would invoke Article 42 of the Convention and presume that the facts stated in the petition were correct. By way of background, the Commission referred to its communications of June 3 and November 10, 1992, by means of which it had transmitted to the Salvadorian State the list of cases then before the Commission on which no response had been received.

28. The State sent its final written comments on September 24, 1993, and provided further information on October 8, 1993.

29. On February 15, 1995, the petitioner submitted additional information.

30. On March 6, 1995, the IACHR placed itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the case, pursuant to Article 48(f) of the American Convention. The petitioners responded on the 28th day of that same month [FN6] to the effect that they wished to work toward a friendly solution on the condition that the Commission would recommend in its report a fair indemnization for the families of the victim and clearly place the responsibility on the State. The State made no response in this regard.

[FN6] See folio 53.

31. On August 6, 1997, the IACHR reiterated its interest in placing itself at the disposal of the parties with a view to arriving at a friendly settlement, and the parties were asked to update the information on the case. Neither of the parties responded in regard to the friendly settlement,

but the State updated its information in a note dated October 6, 1997. The Commission therefore considered that the opportunity to reach a friendly settlement in the case had been exhausted.

IV. ADMISSIBILITY

With regard to the requirements for admissibility, the Commission considers that:

32. The present petition meets the formal requirement for admissibility set forth in paragraphs 1(c) and (d) of Article 46 of the Convention that the subject of the petition is not pending settlement in any other proceeding under an international governmental organization. Moreover, it meets the requirement stipulated in 1(d), in that it contains the name and signature of the legal representative of the entity submitting the petition, which is a nongovernmental organization that is legally recognized in one or more member States of the Organization. The petition itself is written on the letterhead of that entity, which includes its name and address. The Commission is therefore satisfied that this requirement has been met.

33. In light of the foregoing, the Commission concludes that the denunciation meets the formal requirements for admissibility contained in the American Convention on Human Rights and the Regulations of the Commission and, on the basis of these, it has been able to establish that it has competence *ratione materiae* to hear the present case, since it deals with events that are characterized as violations of rights recognized in the American Convention on Human Rights.

34. The petitioning party has alleged the inefficacy of domestic remedies. In this regard it should be pointed out that on June 27, 1988, the Justice of the Peace of San Juan de Opico initiated the proceedings and inspected the scene where the body of Víctor Hernández Vásquez had been found. In this action the Justice of the Peace, together with the coroner on duty, conducted a medical and a legal investigation, and on July 9, 1988, statements were taken from the two soldiers who were guarding the cell in which the victim was being held and found his body. Despite the request from his family, no proper autopsy was performed and no additional steps or inquiries were made in regard to the events that occurred. On March 14, 1990, the Judge of the First Instance of the San Juan de Opico District gave the order to close the record on the case, "because to date no person had been mentioned as author [sic] of the crime."

35. The foregoing confirms the inadequacy of the investigation of the events and the lack of action, or intent to take penal action, on the part of the Ministry of Public Affairs, in an effort to determine the circumstances of the victim's death, or to bring to trial and punish those presumed to be responsible.

36. This issue will be examined more fully later on, since the question of the effective application of domestic remedies as a requirement for admissibility is closely tied to the essence of the matter. Nevertheless, the foregoing allows the Commission to conclude that in the present case the victim and his family have not had the benefit of effective remedy on the part of the Salvadorian State and that therefore the requirements regarding the exhaustion of domestic remedies, set forth in Article 46(1) of the Convention, are not applicable. On the other hand, what does apply is the exception provided for in Article 46(2) (a) of the Convention. It should be

pointed out, however, that at no point did the State object to an exception to the claim of failure to exhaust the remedies under domestic law.

37. It is important to point out, in regard to exceptions to the formal requirement that domestic remedies be exhausted, that the exception referring to the nonexistence of domestic remedies that guarantee the principle of due process (Article 46(2)(a) of the Convention)--which is the exception applicable in the present case--refers not only to the formal absence of remedies under domestic law but also to the situation in which the remedies have not been adequate.[FN7]

[FN7] Mónica Pinto, *La Denuncia ante la Comisión Interamericana de Derechos Humanos*, Editores del Puerto, 1993, p. 64.

38. Finally, it should be added that the petition is not pending settlement in any other proceeding under an international governmental organization, nor is it a duplication of a petition or previous communication already examined by the Commission.

In light of the foregoing, upon concluding that the petition under consideration is admissible, the Commission shall proceed to examine the matter in depth.

V. ANALYSIS

39. The questions of law that the Commission must clarify are the following:

In the first place, the Commission must determine: (1) whether the circumstances under which Víctor Hernández Vásquez died on the base of the Artillery Brigade constitute a violation of Article 4 (in regard to the right to life) and Article 5 (in regard to the right to personal integrity) of the American Convention; and (2) whether the fact that the victim was kept incommunicado was a violation of Article 5 of the American Convention. Second, the Commission must determine whether the judicial investigation conducted upon the death of Víctor Hernández Vásquez was conducted in such a way that it constitutes a violation of Article 25 of the American Convention on Human Rights.

A. Proven facts

40. The Commission considers that it has been established that the victim died while he was being detained and held incommunicado in a cell on the base of the Artillery Brigade in the custody of military personnel of the Brigade. In reaching this conclusion, the Commission took the following points into account:

i. It has been established that Víctor Hernández Vásquez died on June 27, 1988, and that his body was not turned over to his family until June 29, 1988, these facts are not contested by the State.

ii. Both the State and the petitioner agree that the victim was in military service at the Artillery Brigade.

iii. When he died, Víctor Hernández Vásquez was being detained ("arrested and under investigation") in a cell on the base of the Artillery Brigade, a fact that has also not been contested or discredited by the State.

iv. The allegation of the petitioner that the victim was incommunicado during the week prior to June 29, 1988, the date when his body was turned over to his family, has also not been contested or objected to by the Salvadorian State.

v. At the artillery base the mother of the victim was told that her five children, including the victim, were being investigated for connections with guerrilla forces.

vi. With regard to the cause of death, the Commission, based on the evidence provided, finds that the manner in which Víctor Hernández Vásquez died has not been determined unequivocally. The Salvadorian State alleges that the death of Víctor Hernández Vásquez during his incarceration was a suicide, while the petitioner claims that the evidence that has been made available in the case is superficial and has not made it possible to sustain this allegation. The evidence that the State provided to the Commission indicates that the coroner's inquest was merely an external review of the body. In effect, the transcript of the coroner's inquest submitted by the Salvadorian State confirms that the responsible authorities did not conduct an internal examination, *inter alia*, of the chest cavity, neck, or head of Mr. Hernández Vásquez. The Salvadorian State, as it will be stated further below, failed to meet the existing international criteria with regard to its investigation of the cause of death. The photograph of the body of Víctor Hernández Vásquez furnished by the petitioner corroborates the allegation that "the coroner's inquest was limited to an external review of the body."

vii. It has been demonstrated that the proceedings conducted by the San Juan de Opico Justice of the Peace, included, in addition to the coroner's inquest mentioned above, the collection of statements from the two soldiers who were guarding the cell in which Víctor Hernández Vásquez was being detained, and who presumably found the body. This was done on June 27, 1988, the day of the soldier's death.

viii. It has also been established that the Justice of the Peace took a statement from the mother of the victim, that members of her family had requested that an autopsy be performed, and that their request was refused.

ix. On March 14, 1990, the San Juan de Opico Judge of the First Instance ordered that the case be closed "because to date no person has been mentioned as author [sic] of the crime."

B. Violation of the right to life (Article 4 of the Convention)

41. Article 4 of the Convention states:

1. 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.

42. According to this Article, all persons, including those deprived of their freedom, are entitled for the State to respect their right to life.

43. El Salvador had the duty to provide adequate supporting evidence for its thesis that Mr. Hernández Vásquez committed suicide, if it is considered that the victim was being held in its custody and incommunicado and that therefore the State had full control over his life and personal integrity and over all the evidence needed in order to determine the cause of death. However, the evidence provided by the State does not support its claim that this was a case of suicide. In other words, the State did not present any evidence, documents, and/or judicial decisions that were sufficiently strong to establish, with the force of legal truth, that Mr. Hernández committed suicide.

44. In the case under review, the Salvadorian State had the duty to prove or adequately demonstrate that it took the necessary steps to guarantee the life of the detainee. However, the State did not present any evidence on this point and concentrated its defense on the allegation that Víctor Hernández Vásquez took his own life.

45. In this regard, the Commission would like to cite the ruling of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") in which it found that "in proceedings to determine human right violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation." [FN8] From this it may be concluded that the State must be serious in assuming its obligation to investigate all the evidence it can obtain, especially, as in this case, in detention centers where only the State has control over the means of obtaining evidence and only the State has the material possibility of ascertaining what really happened.

[FN8] IA Court HR., Velázquez Rodríguez Case, Judgment of July 29, 1988, Series C N°4, par. 135.

46. In the present case, the statements regarding the circumstances of the death came from the very agents entrusted with custody of the prisoner, who was in isolation, and the judge refused to order an autopsy, despite the request of the victim's family. The coroner's inquest, on the other hand, was superficial and cannot be regarded as fully reliable evidence of suicide. Nor does it prove the absence of marks of torture on the victim's body, which, according to the family, were present when they received it

47. It is a principle of international law that the State must respond for the acts of its agents performed in their official capacity, as well as for the omissions of such agents, even if they are acting beyond the limits of their authority or in violation of domestic law. [FN9] The responsibility of the State extends, inter alia, to violation of the right to life resulting from acts or

omissions on the part of its agents, especially those working in establishments of detention, for which the State is responsible in its capacity as guarantor of the rights of detainees.[FN10]

[FN9] *Idem.*, par. 164.

[FN10] IA Court of HR, case of *Neira Alegría et al.*, Judgment of January 19, 1995, Series C N° 20, par. 60.

48. The jurisprudence of international organizations recognizes that the State is responsible for violations of the right to life in the case of deaths caused indirectly by its agents or with their concurrence in the case of independent causes, as well as for deaths resulting from omissions on the part of such agents, and even, in certain circumstances, when its agents threaten a person's life although the death of the victim is not consummated.

49. One of the decisions of the Committee on Human Rights in this matter involved a political prisoner who, after eight years in prison, was about to be released to establish residence in exile when he suddenly died. The State Party alleged suicide and provided a copy of the autopsy to the Committee, but it did not explain the circumstances of the death, nor did it report that it had conducted an investigation of the death, while the petitioner, a relative of the victim, presented evidence that the suicide theory was unlikely. The Committee considered that the State was responsible for the death, regardless of whether it was a homicide or a suicide, basing its decision on the following line of reasoning:

Although the Committee could not reach a definite conclusion as to whether or not Hugo Dermitt had committed suicide, he was either impelled to do so or died while he was incarcerated, and the inevitable conclusion is that in any case the Uruguayan authorities were responsible, either by act or omission, for not having taken adequate steps to protect his life, as stipulated in paragraph 1, Article 6, of the Pact.[FN11]

[FN11] *Dermitt vs. Uruguay*, (N° 84/1981), par. 9.2, Annual Report of the IACHR, 1983, p. 135.

50. In the case under review, the Inter-American Commission on Human Rights concludes that the victim suffered a violent death while in the custody of Salvadorian authorities and that the State has not provided sufficient evidence to establish beyond a doubt that it was a suicide or to refute the family's allegation of homicide. The Commission also concludes, based on the foregoing, that, regardless of whether the death of Víctor Hernández Vásquez was a homicide or suicide, the Salvadorian State was responsible, as a consequence of the action or omission of its agents, for not having taken adequate steps to protect the life of the detainee, who was in their custody, in isolation, incommunicado, and defenseless, which constitutes a violation of Mr. Hernández' right to life (Article 4, in consonance with Article 1(1), of the American Convention).

C. Right to personal integrity (Article 5 of the Convention)

51. Article 5 of the Convention reads as follows:

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.

52. The Commission considers that the petitioner has provided sufficient supporting evidence, given the means at its disposal, that the State did not guarantee Víctor Hernández Vásquez his physical, mental, and moral integrity, which was an obligation of the State because he was being detained under its exclusive custody (Article 1(1) of the Convention).

53. In this regard, the Inter-American Court of Human Rights has established the following:

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.[FN12]

[FN12] I/A Court H.R., Neira Alegría et al., Case supra, note 10, par. 60. Judgment of January 19, 1995. Series C N° 20. See also Report N°28/96, case 11.297, Guatemala, Annual Report of the IACHR 1996, pag. 502-521.

54. With regard to forcibly holding a victim incommunicado, this tribunal has stated, in Velásquez Rodríguez, that the act in itself constitutes a form of cruel and inhuman treatment which is "harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person." [FN13]

[FN13] I/A Court H.R., Velásquez Rodríguez Case, supra, note 8, par. 156. Judgment of July 29, 1988, Series C N° 4.

55. In the present case we are not dealing with the phenomenon of the forced disappearance of persons, which was the context of the statement above by the Inter-American Court. However, the same line of reasoning may be followed, considering that the Court was referring to the detention and holding of a victim incommunicado followed by disappearance, whereas in the present case we are referring to that systematic practice followed by torture, death, and/or disappearance. In this regard, the Inter-American Court of Human Rights has said that in those places where there has been a practice of forced disappearance of persons (as in El Salvador

during the period when the events in this case occurred), it could be verified that detention, which might end in disappearance, "includes all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity." [FN14]

[FN14] *Idem.*, par. 156.

56. During the internal armed conflict in El Salvador, the Commission was able to verify how those persons accused of being guerrillas, upon being detained, were submitted to torture and mistreatment and would then disappear or turn up dead. [FN15] Added to this is the fact that, upon being held incommunicado, the clandestine and secret nature of this type of detention allowed the captors to act with less external control and greater liberty, encouraging them to exceed the limits of their authority and abuse the detainees.

[FN15] Report on the Human Rights Situation in El Salvador 1994 (OEA/Ser. L/V/II.65. Doc. 28 rev. 11 February 1994), p. 3.

57. In the realm of moral integrity, detention of a victim and holding him incommunicado in itself damages the personality of the individual, who, being isolated and in captivity, is at the mercy of his captors in a process that breaks him down psychologically. This reasoning was recognized by the Inter-American Court when it declared "that keeping a person in a small and isolated cell constitutes cruel and inhumane treatment." [FN16]

[FN16] IA Court of HR, resolution dated July 2, 1996, Preliminary Objections, Judgment of January 31, 1996. Series C No. 25, Provisional Measures Requested by the Inter-American Commission on Human Rights with regard to Peru, case of Loayza Tamayo. The same line of reasoning provided the basis for the Court to dictate provisional measures in the victim's favor, par. 7.

58. It has been established that Víctor Hernández Vásquez was detained arbitrarily and held incommunicado at the base of the Artillery Brigade. This fact violated the victim's right to personal integrity guaranteed in Article 5 of the American Convention on Human Rights, since isolation per se constitutes inhuman and degrading treatment.

59. In light of the foregoing, the Commission concludes that the Salvadorian State was responsible for the fact that the detainee, Víctor Hernández Vásquez, was held in isolation, in violation of his right to physical, mental, and moral integrity and the prohibition against inflicting cruel, inhuman, or degrading treatment established in Article 5 of the American Convention.

D. Violation of the right to judicial protection (Article 25 of the Convention)

60. Article 25, paragraph 1, of the Convention establishes the following:

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

61. Within the framework of Article 1(1) and Article 25 of the American Convention and according to the findings of the Inter-American Court of Human Rights, the Salvadorian State "has the legal duty to reasonably prevent violations of human rights; to conduct a serious investigation, using the means at its disposal, of violations that may have been committed within its jurisdiction in order to identify the responsible parties, punish them appropriately, and ensure adequate reparations for the victim." . The Salvadorian State "has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." The Salvadorian State has the duty to investigate the case "seriously and not merely go through a formality the outcome of which is already predetermined to be fruitless." [FN17] Therefore, the obligation to conduct an investigation is an obligation of means, which requires that the states observe a reasonable degree of diligence in determining the facts.

[FN17] Case of Neira Alegría supra note 10, par. 177. The right to adequate compensation is also closely related to the right to judicial protection enshrined in Article 25 of the Convention. IA Court HR., Judgment of Velásquez Rodríguez, supra note 8 pag. 174.

62. It has been verified that El Salvador did not act with due diligence in its judicial investigation of the present case (Case 127-88) to guarantee the rights of the family of Víctor Hernández Vásquez, based on the following considerations:

i. The State has not demonstrated that it followed the established basic procedures for conducting an autopsy

63. According to the Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions adopted by the United Nations Economic and Social Council:[FN18]

An exhaustive, immediate, and impartial examination shall be conducted in all cases in which there is suspicion of extra-legal, arbitrary, or summary execution, including those in which the complaints of relatives or other reliable reports suggest that a death occurred which was not due to natural causes in the circumstances referred to. The purpose of the investigation shall be to determine the cause, the manner, and the time of death; the person responsible, and the procedure or practice that might have led up to it. During the course of the investigation an adequate autopsy shall be conducted, and all the material and documentary evidence shall be collected and

analyzed, and statements shall be taken from the witnesses. The investigation shall distinguish between death due to natural causes, accidental death, suicide, and homicide.[FN19] [emphasis added].

[FN18] Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, or Summary Executions, recommended by the Economic and Social Council in its Resolution 1989/65 dated May 24, 1989. United Nations, Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Doc. ST/CSDHA/12, p. 41. Also published in HR/1/Rev.5 (vol.1, part 1), p. 422. This resolution was adopted on the basis of a recommendation by the Committee for the Prevention and Control of Crimes, at its 10th. session, held in Vienna on February 5-16, 1990. The principles referred to were endorsed by the United Nations General Assembly in its Resolution 44/162, dated December 15, 1989.

The Commission has adopted these principles as a guide in previous reports, such as: Report N° 10/95, case 10.580, Ecuador, Annual Report of the IACHR, 1995, OEA/Ser.L/V/II.91 Doc. 7, rev. 3, 3 April 1996, par. 32-34; Report N° 55/97, case 11.137, Argentina, 18 November 1997, Annual Report of the IACHR, 1997, OEA/Ser.L/V/II.97 Doc. 38, par. 413 - 424.

[FN19] *Idem.*, par. 9.

64. These principles establish that, insofar as possible, the autopsy report should include detailed color photographs of the deceased person, in order to document or corroborate the conclusions of the investigation.[FN20] The family of the deceased shall have the right to insist that a representative of theirs, either a physician or other qualified person, is present at the autopsy.[FN21]

[FN20] *Idem.*, par. 13.

[FN21] *Idem.*, par. 16.

65. In order to guarantee an exhaustive and impartial investigation of an extra-legal, arbitrary, or summary execution, the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, approved as a supplement to the principles mentioned, and, in particular, the Model Protocol for an Investigation of Extra-Legal, Arbitrary, and Summary Executions ("Minnesota Protocol")[FN22] states that one of the most important aspects of the investigation is the collection and analysis of the evidence.[FN23]

[FN22] United Nations, Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions ("Minnesota Protocol"), Doc. ST/CSDHA/12, adopted for the purpose of supplementing the Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, or Summary Executions, *Supra*, note 18. According to this protocol (Chapter III, section B, of the Manual), and paragraph 9 of the principles cited above, the main purpose of an investigation is to discover the truth about events that occasioned

the suspicious death of a victim. To this end, the Manual stipulates that those who conduct the investigation should take the following steps at the minimum: (a) identify the victim; (b) collect and preserve any media offering evidence in regard to the death in order to assist as much as possible in bringing the responsible parties to justice; (c) identify the possible witnesses and obtain statements from them with regard to the death; (d) determine the cause, manner, location, and time of the death, as well as any procedure or practice that might have provoked the death; (e) distinguish between natural death, accidental death, suicide, and homicide; (f) identify and apprehend the person or persons that might have participated in the execution; and (g) submit the suspected perpetrator or perpetrators of a crime to a competent, legally established court.

[FN23] *Idem.*, Procedures of an inquiry..., Ch. III. C., p. 16.

66. According to the standards established in this protocol, the procedure for collecting evidence at the scene of the crime should follow certain criteria, including the following: (a) the area around the body should be cordoned off, and only the investigators and their staff may be allowed to enter this area; (b) color photographs should be taken of the victim because they are more likely than black-and-white photographs to reveal details about the nature and circumstances of the victim's death; (c) photographs should be taken of the site (both inside and outside) and any physical evidence; (d) the position of the body and the condition of the clothing should be duly recorded; (e) note should be taken of the following factors which might serve to determine the time of death: (i) temperature of the body (warm, cool, cold); (ii) location and degree of fixation of livid areas; (iii) cadaveric rigidity; and (iv) state of decomposition.[...][FN24]

[FN24] *Idem.*, Processing of the Crime Scene, Ch. III. C.1, p. 16.

67. The Manual also contains a protocol for a model autopsy,[FN25] including a list of steps to be followed in a forensic postmortem examination. With regard to the scene of the crime, the following steps should be taken, among others: photographs should be taken of the body in the position in which it was found, and information should be recorded on the position and condition of the body, including whether it was warm or cold, and its degree of lividity and rigidity. The autopsy itself requires, *inter alia*, taking color photographs that confirm all the visible signs of injuries or diseases referred to in the autopsy report; taking X-rays of the body; and conducting a detailed examination of the skin, teeth, face, eyes, nose, nails, genitals, extremities and other parts of the body to detect any marks indicative of injuries.

[FN25] Manual on the Effective Prevention... Ch. IV, *supra.*, note 24, p. 24.

68. Especially important in cases of presumed suicide by hanging in which the family alleges that there has been a summary execution, as in the present case, is the external examination of the neck. In particular, the autopsy protocol indicates that the following steps should be taken:

Examine all aspects of the neck externally and take note of any contusions, abrasions, or petechiae. Describe and document the types of lesions in order to differentiate between manual strangulation, strangulation with some form of ligature, and hanging. Examine the neck at the end of the autopsy, when the blood has been drained from the area and the tissues are dry.[FN26]

[FN26] Idem., Ch. IV. B.2 (g) (xiv), ... "Manual of the Effective Prevention..." p. 30.

69. The results of the external examination should be supplemented with a detailed internal examination of the cadaver by regions of the body or by systems, including the cardiovascular, respiratory, biliary, gastrointestinal, endocrine, musculoskeletal, and central nervous systems.[FN27] The examination should include, inter alia, the chest cavity, abdomen, liver, spleen, pancreas, kidneys, and adrenal glands. The aorta, the vena cava inferior, the venae ileales [ileal veins], the pelvic organs, the venae cerebelli [cerebellar veins], the cervical, thoracic, and lumbar vertebrae, etc., should also be examined. In addition, topological tests should be performed, and all foreign objects (projectiles, knives, etc.) should be preserved as evidence, as well as clothing, finger and toenails, hair, etc. A complete report should be submitted to the competent authorities and the family of the deceased.[FN28]

[FN27] Idem., Chapter IV, section B. 2 (h), pp. 31-33.

[FN28] Idem.

70. Also, according to these forensic procedures, the first steps in the investigation should include, among others, an inquiry into the medical history of the victim, which is of special importance in the present case, in order to establish whether or not there had been previous attempts at suicide.[FN29]

[FN29] In the "investigation of the crime scene," one of the regular and necessary procedures that is indicated for coroners that have access to the body at the place of death is to obtain a medical history of the victim from his physician and any hospital records, including "the use of alcohol or drugs, suicide attempts, and habits" "Manual of the Effective Prevention..." p. 29.

71. Finally, the Commission should note that the Salvadorian laws in effect at the time of the events required, among other measures, that an autopsy be conducted as a routine procedure in this type of case. According to the provisions of Article 162 of the Code of Criminal Procedure[FN30] in effect at the time of the events, an autopsy should have been ordered by the judge at the government's initiative or in response to a petition from one of the parties.

[FN30] Code of Criminal Procedure, 1973, Decree N° 450, Official Gazette, N° 208, vol. 241, dated November 9, 1973.

72. In the case under consideration, the IACHR considers it has been established that the State only performed a superficial postmortem examination of the victim's body, that it did not perform the legal autopsy officially required, and that it did not respond to the request of the family that the examination be conducted. Nor did it take into account that the Commission on Human Rights had detected signs of torture on the body.

73. The body of evidence that has been provided does not include any information on the medical history of the victim that might indicate a possible record of attempted suicide, nor does it include a record of the condition of the body, including whether it was warm or cold or its degree of lividity and rigidity; it does not include detailed color photographs confirming the visible signs of injuries or diseases, or detailed color photographs of the deceased that might serve to document and corroborate the conclusions of the investigation; it does not include X-rays of the body, nor does it include any report of a detailed examination of the skin, teeth, face, eyes, nose, nails, genitals, extremities, and other parts of the body, conducted to detect any marks indicative of lesions.

74. In particular, the autopsy report does not include results of the examination of the neck that might document the types of lesions in order to differentiate between manual strangulation, strangulation by ligature, and hanging. Nor do the results available indicate that the international standard has been followed calling for the neck to be examined at the end of the autopsy, after the blood has been drained from the area and the tissues are dry.

75. Especially, the report of the coroner's inquest fails to include any evidence that there was an internal examination of the cadaver by regions of the body or by systems, or of the chest cavity, abdomen, liver, spleen, pancreas, kidneys, adrenal glands, aorta, vena cava inferior, venae ileales, pelvic organs, venae cerebelli, cervical, thoracic, and lumbar vertebrae, etc.

76. Nor has it been proven that toxicological tests were performed and that all foreign objects (projectiles, knives, etc.) have been preserved, as well as clothing, nails, hair, etc. It is obvious that, since no autopsy was performed, no full report was submitted to the competent authorities or given to the family of the deceased.

77. The foregoing allows the Commission to conclude that no autopsy was performed and that the postmortem examination at the scene did not conform to the basic procedures established for conducting an autopsy, as stipulated in the international standards cited above.

ii. The Salvadorian State was negligent in the way it conducted the proceedings in regard to the death of Víctor Hernández Vásquez

78. It has been established that during the proceedings the justice of the peace responsible for conducting the investigation performed only a superficial external postmortem examination.[FN31] In addition, he collected statements from the two soldiers who were guarding the cell where the victim died and a statement from the mother of the victim.

[FN31] See *idem.*, Article 161.

79. Salvadorian law establishes that:

Criminal action shall be initiated and prosecuted by the Minister of Public Affairs or at the initiative of the judge, without prejudice to the right to file an accusation under the law (Article 86 of the Code of Criminal Procedure, 1973). [Supra 80, pp. 33]

80. Unlike the situation in other Latin American countries,[FN32] this legislation does not recognize the right of victims to intervene in the penal process in the case of a criminal action.[FN33]

[FN32] See, for example, Article 80 of the Uruguayan Code of Criminal Procedure, which entitles the victim to request, during the summary proceeding, that all useful steps be taken to verify the crime and identify the guilty parties, and Chile's Code of Criminal Procedure, Title II, on penal action and civil action in the criminal process, Articles 10/41. As the Commission has said, the victim's right to resort to the courts is essential in order to set the criminal process in motion and carry it forward (Annual Report of the Inter-American Commission on Human Rights, 1996, *supra*, note 70, Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), par. 62, and Report N° 36/96, Case 10.843 (Chile), par. 63.

[FN33] It should be noted that Article 95 of El Salvador's Code of Criminal Procedure that went into effect in April 1998 does recognize this right and stipulates that "in crimes of criminal action, the victim, through his representative, shall be allowed to intervene in the process, with all the rights and powers provided in the Constitution of the Republic, in this code, and in other laws." In other words, El Salvador's legislation on criminal procedure has recognized the figure of the complainant as the subject of criminal action—in other words, the right of the victim of an offense entailing criminal action, which is preserved by a formal request that he be considered as a party, to take action within the criminal process, together with the attorneys for the Government.

81. Thus the law does not allow for participation and control by affected private individuals (action for private injury), which, in the event that the State has not diligently assumed its obligation as prescribed in Article 86 of the Code of Criminal Procedure, leaves the guarantee of judicial protection contained in Article 25 of the American Convention without effect.[FN34]

[FN34] See, *inter alia*, Report N° 48/97, Case No. 11.411, Severiano and Hermelindo Santiz Gómez, "Ejido Morelia," Mexico, February 18, 1998, Annual Report of the IACHR, 1997, par. 50; Report N° 49/97, Case 11.520, Tomás Porfirio Rondin, "Aguas Blancas," Mexico, February 18, 1998, Annual Report of the IACHR, 1997, par. 67.

82. Although the foregoing is true, it does not alter the fact that in the case of this kind of crime, which can be prosecuted at the initiative of the State, and even those crimes involving a private petition (in a criminal matter), the State has the obligation to investigate and prosecute crimes—that is, to preserve public order and guarantee the right to justice. In its capacity as the holder of punitive action, the State, through the Ministry of Public Affairs, has the obligation, which cannot be either delegated or renounced, to act or promote penal action and set in motion the various steps involved in the proceedings up until their conclusion.[FN35]

[FN35] In this regard, see, for example, Report N° 12/95, Caso 11.218 (Nicaragua) OEA/L/II.90. Doc. 16, 13 September 1995, par. 7.19; Annual Report of the Inter-American Commission on Human Rights, 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997. Reports N° 36/96, Case 10.843 (Chile), October 15, 1996. With regard to the due speed that should be demonstrated by the Ministry of Public affairs in setting the process in motion, see Inter-American Court of Human Rights, case of Velásquez Rodríguez, Judgment of July 29, 1988, par. 79.

83. The Inter-American Court of Human Rights has recognized this concept in its doctrine by saying that the obligation to investigate should have the sense and be assumed by the State as a proper legal right, that it is not simply an action taken by private interests which depends on the victim or his or her family to initiate the process to ensure that the public authority effectively seeks the truth.[FN36]

[FN36] IA Court HR., Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, par. 177.

84. In other words, according to the Salvadorian criminal law in effect at the time of the events, the State held the authority to take and exercise punitive action, through the Ministry of Public Affairs, and it held the exclusive monopoly on penal action, which included official actions on the part of the its agents entrusted with promoting it.

85. In the situation under analysis, this implies that the impetus and successful outcome of the criminal investigation depended fundamentally on the degree of diligence of the justice of the peace to establish the cause of death of Víctor Hernández Vásquez.

86. In the present case, it has been demonstrated that there was incapacity or lack of will on the part of the Salvadorian Ministry of Public Affairs to carry out investigations for the purpose of arriving at this outcome.

87. Indeed, more than a year and a half after the process was initiated, the case was closed on the basis of the aforementioned statements and the postmortem examination conducted at the site. In light of the scant impetus given to the procedure by the Ministry of Public Affairs, the investigation was not continued, the examination (i.e., autopsy) was not performed, nor was the

evidence collected, as called for in the Nations standards to which we have referred above,[FN37] and domestic Salvadorian law prescribes routine measures in this type of case.

[FN37] See supra, notes 18, 22.

88. The Commission therefore concludes that the Salvadorian State violated the right to judicial protection (Article 25 of the Convention, in consonance with its Article 1(1) because it failed to investigate with diligence the circumstances surrounding the death of Mr. Hernández Vásquez; it failed to initiate penal action; and it failed to follow the procedural steps to carry the case to its ultimate outcome.

VI. ACTIONS TAKEN BY THE STATE SINCE NOTIFICATION OF THE REPORT PREPARED PURSUANT TO ARTICLE 50 OF THE CONVENTION

89. On November 3, 1998, the Commission transmitted its Report N° 70/98 to the State, pursuant to the provisions of Article 50 of the American Convention, allowing it a period of 60 days in which to adopt the measures necessary in order to comply with the recommendations contained therein.

90. In view of the fact that said period ended on January 30, 1999, and the State did not send any response within that time, in light of the considerations outlined above, and in accordance with the provisions of Article 51, items 1 and 2, of the American Convention, the Commission reiterates the following conclusions and recommendations which were transmitted to the Salvadorian State in its Provisional Report N° 70/98, to wit:

VII. CONCLUSIONS

91. The Commission reiterates its conclusion that the Salvadorian State is responsible for violation, to the detriment of Víctor Hernández Vásquez, of the right to life, the right to personal integrity, and the right to judicial protection, recognized, respectively, in Articles 4, 5, and 25 of the American Convention on Human Rights, all of them in consonance with Article 1 (1) of the same legal instrument.

VIII. RECOMMENDATIONS

In light of the considerations presented above, the Commission reiterates its recommendations to the Salvadorian State that it take the following steps:

1. Investigate the death of Víctor Hernández Vásquez exhaustively, expeditiously, and impartially, and prosecute and bring to justice those who are responsible, in accordance with the domestic laws and procedures of El Salvador.
2. Make reparations to the family members of the victim whose rights were violated, including the payment of a compensatory indemnization.

3. Investigate the conduct of the officials who intervened in the performance of the postmortem examination, in particular those who conducted the investigation and refused to perform the legal autopsy.

The Commission agrees to transmit the present report to the parties—who shall not be at liberty to publish it—and to grant the Salvadorian State a period of one month in which to take the necessary steps to comply with the foregoing recommendation. This period shall start on the day the report is transmitted to the State.

IX. PUBLICATION

91. On March 12, 1999, the Commission sent Report N° 65/99 to the Salvadorean State and to the petitioners, in keeping with Article 51(2) of the American Convention; and it set a deadline of one month for the State to comply with the foregoing recommendations. The State failed to present a response within the time limit.

92. Accordingly, and pursuant to Articles 51(3) of the American Convention and 48 of the Commission's Regulations, the Commission decides: to reiterate the conclusions and recommendations contained in this report and to include it in the Commission's Annual Report to the General Assembly of the OAS. Pursuant to the provisions contained in the instruments governing its mandate, the IACHR will continue to evaluate the measures taken by the Salvadorean State with respect to those recommendations, until the State has fully complied with them.

Given and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 13 day of April 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman; and Commissioners Carlos Ayala Corao, Alvaro Tirado Mejía, and Jean Joseph Exumé.