

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 55/96; Case 8076
Session:	Ninty-Fourth Special Session (6 December 1996)
Title/Style of Cause:	Axel Raul Lemus Garcia v. Guatemala
Doc. Type:	Report
Decided by:	Chairman: Professor Claudio Grossman; First Vice Chairman: Ambassador John S. Donaldson; Second Vice Chairman: Professor Carlos Ayala Corao; Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.
Dated:	6 December 1996
Citation:	Lemus Garcia v. Guatemala, Case 8076, Inter-Am. C.H.R., Report No. 55/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)
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I. BACKGROUND INFORMATION

1. On September 23, 1982, the Inter-American Commission on Human Rights (the "Commission") received a communication denouncing the alleged abduction and disappearance of Mr. Axel Raúl Lemus García, a Guatemalan citizen, age 19, and a student in his sixth year of high school at the Escuela Normal Central para Varones (Central School for Boys).

II. FACTS

2. As alleged in the complaint and as shown in the attached documentation, on June 3, 1982, at 11:30 a.m., Axel Raúl Lemus García was abducted in the vicinity of the INCA, a high school for girls, by agents of the Technical Investigation Department of the National Police of Guatemala. At the time of his abduction, Mr. Lemus García was severely beaten and then put in a pick-up truck and taken to a detention facility of the National Police. Present at the scene were a number of people from the media, who were told by the kidnappers that Lemus García was being taken to a detention center for questioning.

3. The complaint states that Axel Raúl Lemus García is still disappeared and that the Guatemalan State has never investigated and solved the case. Two petitions of habeas corpus were filed, one on June 8, 1982 and another at a later date, to determine his whereabouts. However, these remedies were ineffective.

III. PROCESSING WITH THE COMMISSION

4. The Commission began its processing of this complaint on October 7, 1982, and registered it as case 8076.

5. On that same day, acting in accordance with Article 48.1.a of the American Convention, the Commission forwarded to the Guatemalan Government the pertinent parts of the complaint, with the request that it provide information on the facts reported therein under the terms of Article 34 of its Regulations (then Article 31).

6. When no reply from the Guatemalan Government was forthcoming, the Commission repeated its request on May 17, 1984, and gave the Government an additional thirty days in which to reply, indicating the possible application of Article 42 (then Article 39) of the Commission's Regulations which provides for the presumption of the truth of the facts denounced.

7. On February 19, 1985, since no information had been received from the Guatemalan Government, the Commission requested information on the case once again, giving the Government a thirty-day deadline and mentioning yet again the possibility of application of Article 42 of the Commission's Regulations.

8. When the Guatemalan Government did not respond, on June 26, 1985, the Commission sent the same request to the Government and once again warned of the application of Article 42 of its Regulations. Again, the Commission did not receive any response from the Guatemalan Government in connection with this case.

9. To date, the Government of Guatemala has not provided any of the information requested by the Commission.

IV. CONSIDERATIONS

a. Admissibility

10. The conclusion drawn from the background information analyzed herein is that the Commission is competent to entertain the complaint filed in the instant case, since it alleges facts that would constitute violations of the rights of Axel Raúl Lemus García recognized in Articles 1, 3, 4, 5, 7, 8 and 25 of the American Convention on Human Rights.

11. The Commission considers that there is no reason to allege that the complaint is manifestly groundless or obviously out of order, or that it is substantially the same as a petition previously studied by the Commission or pending in another international proceeding for settlement (Articles 46.1.c and 47.c,d of the American Convention).

12. As for the exhaustion of domestic remedies, the Government of Guatemala never replied to any of the Commission's requests for information on this issue. The purpose of the rule requiring exhaustion of domestic remedies is to give the state the opportunity to resolve the problem under its internal law before being confronted with an international proceeding.[FN1]

Therefore, given the Government's silence, the Commission assumes it is tacitly waiving its right to invoke the rule of prior exhaustion.[FN2]

[FN1] See Inter-American Court of Human Rights, Velásquez Rodríguez case, Judgment of July 29, 1988, par. 61.

[FN2] See Inter-American Court of Human Rights Cases: Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, par. 88; Fairén Garbi and Solís Corrales, Preliminary Objections, Judgment of June 26, 1987, par. 87; Godínez Cruz, Preliminary Objections, Judgment of June 26, 1987, par. 90.

13. Apart from the implied waiver of the requirement stipulated in Article 46.1.a, the Commission considers that in the case of Axel Raúl Lemus García, the domestic remedies have been ineffective, have not provided the guarantees of due process and have unjustifiably failed to provide any ruling in respect to his person. These factual situations are contemplated in Article 46.2 of the Convention as exceptions to the requirement of exhaustion of domestic remedies set forth in Article 46.1.a.

14. In effect, the notes that the petitioner sent to the Commission show that Guatemala's domestic remedies have been unsuccessful in solving the disappearance of Axel Raúl Lemus García. On June 8, 1982, the family of Mr. Lemus García filed a petition of habeas corpus to ascertain his whereabouts. Thereafter, they filed another petition for the same purpose. The petitioners allege that the petitions they filed did not result in an investigation to determine the whereabouts of Axel Raúl Lemus García.

15. The petitioners state that in the hope of finding Mr. Lemus García alive, they sent a number of written communications to then President of Guatemala, Efraín Ríos Montt, the Minister of Public Education, the Minister of Defense, the Vice Minister of Government, the Deputy Secretary of Public Relations of the Office of the President, and the Director of the National Police. None of these communications had any result.

16. A special petition was sent to the Minister of Government, who on July 5, 1982, ordered the Office of the Director General of the National Police, through the Department of Technical Investigations, to conduct the appropriate inquiries as quickly as possible. The order to investigate was never carried out.

17. None of the actions filed by Mr. Lemus García's next-of-kin was effective in securing protection of the rights which were violated. The State of Guatemala did not act on the petitions of habeas corpus by conducting an efficient and adequate investigation based on due process, that would determine the whereabouts of Mr. Lemus García and establish the identity of those responsible for his disappearance.[FN3] This situation is consistent with a pattern of ineffective legal remedies, especially in relation to the remedy of habeas corpus, which the Commission found in Guatemala at the time the events denounced occurred.[FN4]

[FN3] The Inter-American Court of Human Rights has stated that: "In keeping with the object and purpose of the Convention and in accordance with an interpretation of Article 46.1.a) of the Convention, the proper remedy in the case of forced disappearance of persons would ordinarily be habeas corpus, since those cases require urgent action by the authorities. Consequently, `habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty' (Velásquez Rodríguez case, Judgment of July 29, 1988, . . . paragraph 65; Godínez Cruz case, Judgment of January 20, 1989, . . . paragraph 68; and, Fairén Garbi and Solís Corrales case, Judgment of March 15, 1989, . . . paragraph 90)." Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, par. 64.

[FN4] See Annual Report of the Inter-American Commission on Human Rights 1983-1984, OEA/Ser.L/V/II.63, doc. 10, 24 September 1984, p. 107-08.

b. Merits

18. The Government of Guatemala has never disputed the kidnapping and disappearance of Mr. Lemus García, or the fact that they were the work of State agents. In fact, from the time the pertinent parts of the complaint were first transmitted to the Government, and despite repeated requests, the Government has never supplied any information in connection with this case, thereby violating its international obligation under Article 48 of the American Convention. Therefore, the Commission considers that the presumption based on Article 42 of its Regulations applies in the instant case. Article 42 of the Commission's Regulations provides that the facts reported in the petition whose pertinent parts have been transmitted to the Government in reference shall be presumed to be true if, during the time period set by the Commission, the Government has not provided the pertinent information requested, as long as other evidence does not lead to a different conclusion.[FN5] In this case, the information which exists does not contradict the version of the facts alleged in the complaint but rather supports that version of events.

[FN5] The Inter-American Court of Human Rights has confirmed that, "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law." Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 138.

19. Because people from the media were present when Lemus García was abducted by police agents, the facts denounced can be verified.[FN6] Moreover, from the reason that his abductors gave for his detention ("questioning"), the Commission can reasonably conclude that the detention was committed by agents of the Guatemalan State. In addition, the manner and circumstances of Axel Raúl Lemus García's abduction were similar to the methods used in other abductions and unlawful detentions in which State security agents were involved. By the time the events occurred, the Commission had confirmed an "extraordinary number" of cases like that of Mr. Lemus García, involving abduction and disappearance by security agents.[FN7] The abductions and unlawful arrests were generally perpetrated by groups of heavily armed

individuals, who intercepted their victims on public streets or at their places of work or in the home, and informed no one of either the reasons for the alleged arrest or where the victim would be taken. The abductors operated in plain view and generally traveled in private vehicles.[FN8] Axel Raúl Lemus García was abducted in precisely that manner.

[FN6] See publications of June 4 and 5, 1982, in the newspaper "La Razón" and June 10, 1982, in the newspaper "Prensa Libre". These articles cover the kidnapping of Axel Raúl Lemus García.

[FN7] See Report on the Situation of Human Rights in the Republic of Guatemala, OEA/Ser.L/V/II.53, doc. 21 rev. 2, 13 October 1981, p. 34.

[FN8] See Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.61, Doc. 47 rev. 1, October 5, 1983, p. 76.

20. Based on the foregoing, the Commission concludes that on June 3, 1982, Axel Raúl Lemus García was abducted by agents of the Department of Technical Investigations of the Guatemalan National Police. Since the time of his kidnapping, his whereabouts have remained unknown.

c. Conclusion on points of law

21. What Mr. Axel Raúl Lemus García experienced on June 3, 1982, fits the definition of "forced disappearance" which has been developed by the jurisprudence of the Commission and the Inter-American Court of Human Rights and which was incorporated into Article II of the Inter-American Convention on Forced Disappearance of Persons.[FN9]

[FN9] See Annual Report of the Inter-American Commission on Human Rights 1985-86, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 26 September 1986, p. 37-38; Annual Report of the Inter-American Commission on Human Rights 1982-83, OEA/Ser.L/V/II.61, doc. 22 rev. 1, 27 September 1983, p. 46-48; Annual Report of the Inter-American Commission on Human Rights 1980-81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 October 1981, p. 113-14; Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 147; Inter-American Convention on Forced Disappearance of Persons, Article II. The Inter-American Convention on Forced Disappearance of Persons entered into force on March 28, 1986, after Argentina and Panama deposited their instruments of ratification with the General Secretariat of the OAS on February 28, 1986. Guatemala has signed, but not yet ratified, that convention.

22. The Inter-American Court of Human Rights (the "Court" or the "Inter-American Court") has held that "the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee." [FN10] The preamble to the Inter-American Convention on Forced Disappearance of Persons reaffirms that the forced disappearance of persons "violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the

American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights."[FN11]

[FN10] See Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 155. The Court's holding in this respect is supported by the declarations of other international organs which confirm that the forced disappearance of persons constitutes a multiple violation of rights recognized internationally. See, e.g., Declaration on the Protection of All Persons from Enforced Disappearance, United Nations General Assembly Resolution 47/133, December 18, 1992, art. 1.1.

[FN11] Inter-American Convention on Forced Disappearance of Persons, third paragraph of the preamble.

23. Based on these principles, the Commission examines the human rights that were violated as a result of the forced disappearance of Mr. Axel Raúl Lemus García.

The right to juridical personality

24. The disappearance of Mr. Axel Raúl Lemus García constitutes a violation of his right to recognition as a person before the law protected by Article 3 of the Convention. When Axel Raúl Lemus García was disappeared by agents of the Government, he was necessarily placed outside of and excluded from the juridical and institutional order of the State. This exclusion had the effect of denying recognition of the very existence of Mr. Lemus García as a human being entitled to be recognized as such before the law.[FN12]

[FN12] See Declaration on the Protection of All Persons from Enforced Disappearance, Art. 1.2, characterizing forced disappearance as "a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law." United Nations General Assembly Resolution 47/133, December 18, 1992.

The right to life

25. Mr. Lemus García is still disappeared. The Inter-American Court has held that, "[t]he practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life."[FN13] Moreover, the context in which the disappearance occurred and the fact that fourteen years later Mr. Lemus García is still disappeared, create a reasonable presumption that Mr. Lemus García was killed.[FN14]

[FN13] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 157.

[FN14] Idem, par. 188.

26. For these reasons, the Commission concludes that the facts denounced constitute a violation of Mr. Lemus García's right to life recognized in Article 4 of the American Convention on Human Rights.

The right to humane treatment

27. Under Article 5 of the American Convention, every person has the right to have his physical, mental and moral integrity respected. The facts denounced in the instant case constitute a violation of Axel Raúl Lemus García's right to humane treatment.

28. The Inter-American Court has stated that, "prolonged isolation and deprivation of communication are in themselves cruel and inhumane treatment, 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"[FN15]

[FN15] Idem, par. 156.

The right to personal liberty

29. As for the violation of this right, the Inter-American Court has held that: "The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of the detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty"[FN16]

[FN16] Idem, par. 155.

30. The abduction and disappearance of Axel Raúl Lemus García, which the Commission has confirmed, constitute a violation of his right to personal liberty, recognized in Article 7 of the American Convention.

The right to due process of law and to judicial protection

31. Under Articles 8 and 25 of the American Convention, everyone has the right to recourse to a competent court or tribunal for protection against acts that violate his fundamental rights, and the State is obligated to provide the minimum guarantees for the determination of his rights. The domestic remedies of the Guatemalan State have not provided what is necessary to fulfill these rights and are therefore in violation of the American Convention.

32. Article 25.1 introduces the principle recognized in the international law of human rights whereby the instruments or procedural means designed to guarantee such rights must be effective. It is not sufficient that a state's legal system formally recognize the remedy in question; instead, the state must develop the possibility of an effective remedy that is substantiated in accordance with the rules of due process of law.[FN17]

[FN17] See Inter-American Court of Human Rights Cases: Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, par. 91; Fairén Garbi and Solís Corrales, Preliminary Objections, Judgment of June 26, 1987, par. 90; and Godínez Cruz, Preliminary Objections, Judgment of June 26, 1987, par. 93.

33. The domestic remedies of the Guatemalan State have not provided an adequate and effective remedy that provides the minimum guarantees and a decision regarding the rights of Axel Raúl Lemus García, establishing his whereabouts and determining the identity and responsibility of the authors of the abduction.

34. The failure of the domestic remedies in the instant case not only justifies a finding to the effect that the petitioners are not obligated to file and exhaust those remedies, but also implicates the Guatemalan State in a violation of the rights to judicial protection and due process of law, recognized in Articles 25 and 8 of the American Convention.[FN18]

[FN18] Idem.

Obligation to ensure and respect rights

35. The State of Guatemala has not complied with its obligation under Article 1.1 of the American Convention, to "respect the rights and freedoms recognized [t]herein and to ensure to all persons subject to [its] jurisdiction the free and full exercise of those rights and freedoms." Therefore, it is responsible for violations of the rights protected under Articles 3, 4, 5, 7, 8 and 25 of the Convention.

36. Under Article 1.1, the first obligation of the States Parties of the American Convention is to respect the rights and freedoms recognized therein.

37. To determine what manner of the exercise of public power violates the obligation to respect rights embodied in Article 1.1, the Inter-American Court has stated that, "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law." Moreover, "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State." [FN19]

[FN19] See Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 170, 172.

38. The Commission has concluded that the abduction of Axel Raúl Lemus García on June 3, 1982, his disappearance and the subsequent denial of justice, all violations of the rights contemplated in Articles 3, 4, 5, 7, 8 and 25 of the Convention, were perpetrated by Government agents who acted in their position of authority. Therefore, the Guatemalan State has violated its obligation under Article 1.1 to respect the rights of Axel Raúl Lemus García recognized in the American Convention.

39. The second obligation that emanates from Article 1.1 is that of ensuring the free and full exercise of the rights and freedoms recognized in the Convention. "This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention." [FN20]

[FN20] *Idem*, par. 166.

40. The Commission has concluded that the internal remedies of the Guatemalan State did not succeed in investigating the violation of the rights suffered by Mr. Lemus García, nor were those responsible for those violations punished, nor were the consequences of the violations redressed. Therefore, the Commission concludes that the Guatemalan State also violated Article 1.1 because it did not ensure to Mr. Axel Raúl Lemus García and his family the exercise of their rights.

V. TRANSMISSION OF REPORT 20/96 TO THE GOVERNMENT

41. Confidential Report 19/96 was approved by the Commission on April 30, 1996, during its 92nd Regular Session, and was transmitted to the Government of Guatemala on May 31, 1996, with a request that it provide information as to the measures that had been taken to resolve the situation denounced within a period of 60 days. At the same time, the Commission informed the parties that it placed itself at their disposal for a friendly settlement, based on respect for the human rights set forth in the American Convention, and set a period of 30 days for the parties to advise whether they were willing to participate in such a procedure. As of the date of this report, the Commission has received no response to its offer to facilitate a friendly settlement, and thus considers that this proposal was not accepted.

42. By means of a note dated July 22, 1996, the Government of Guatemala requested that the period within which it was to provide its response to the Commission be extended by 60 days, given that various State institutions were in the process of gathering relevant information. In a note of July 31, 1996, the Commission informed the Government that it had been granted an

additional 70 days to provide information as to the measures it had taken. The Commission also transmitted to the Government copies of pertinent documents from the case file for its information.

43. Notwithstanding the extension granted, the Government has provided no response with respect to this case.

VI. FINDINGS

44. In light of the information and observations provided above, that the Guatemalan State has violated Mr. Axel Raúl Lemus García's rights to life, to humane treatment, to personal liberty, to due process of law and to judicial protection, all recognized, respectively, in Articles 3, 4, 5, 7, 8 and 25 of the American Convention on Human Rights, in relation to Article 1.1 thereof.

45. Article 1 of the American Convention sets forth the undertaking of States Parties first, to respect the rights and freedoms recognized, and second, to ensure the free and full exercise of those rights. The latter obligation refers to the State's duty to prevent, investigate and punish human rights violations. The consequence of this duty is the continuing responsibility of the State to "attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights." (Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 166.)

VII. RECOMMENDATIONS

46. In accordance with the foregoing analysis, the Commission recommends to the State of Guatemala that:

a. It immediately conduct an impartial and effective investigation into the facts denounced that determines the whereabouts of Axel Raúl Lemus García, that establishes the identity of the perpetrators and that imposes the appropriate punishments.

b. It adopt measures to make full reparation for the proven violations, including: taking steps to locate the remains of Axel Raúl Lemus García; making the arrangements necessary to facilitate the wishes of his family as to an appropriate final resting place; and compensating his family members.

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