

**REPORT No. 23/12**  
PETITION 1180-04  
INADMISSIBILITY  
EDGAR MANUEL DE LEON LEMUS  
GUATEMALA  
March 20, 2012

**I. SUMMARY**

1. On November 4, 2004, the Inter-American Commission on Human Rights (hereinafter the "Commission," the "Inter-American Commission," or the "IACHR") received a petition submitted on his own behalf by Manuel De León Lemus (hereinafter "the alleged victim"), together with Mr. Marco Leonel Nitsch Albizures (hereinafter "the petitioners"), alleging the international responsibility of the Republic of Guatemala (hereinafter "Guatemala," the "State," or the "Guatemalan State") for the alleged arbitrary order of discharge from the Guatemalan Army, issued by the Minister of Defense, to the detriment of Mr. De León Lemus.

2. The petitioners allege that the State is responsible for violating Articles 8 (judicial guarantees), 11 (protection of honor and dignity), 14 (right of rectification or reply), 24 (equality before the law), 25 (judicial protection), and 29 (rules of interpretation) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"); and that the admissibility requirements have been met. The State alleges that there has been no violation of the human rights enshrined in the American Convention in the instant case, as the procedure employed by the Ministry of National Defense was in keeping with the provisions of the laws and regulations of the Guatemalan Army.

3. After examining the parties' positions the Commission concludes that it is competent to hear the petition under analysis and that the case is inadmissible in light of Articles 46 and 47 of the American Convention. The Commission also decided to give notice of this decision to the parties, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

**II. PROCEDURE BEFORE THE COMMISSION**

4. On December 4, 2004, the Commission received a petition dated October 26, 2004, presented by Marco Leonel Nitsch Albizures in representation of the alleged victim, Mr. Edgar Manuel De León Lemus, and assigned it number 1180-04. On May 12, 2005, the IACHR transmitted the pertinent parts to the State, asking that it submit its response within two months, in keeping with Article 30(3) of the Rules of Procedures of the Inter-American Commission on Human Rights (hereinafter the "Rules of Procedure"). The State's response was received on October 5, 2005. In addition, the IACHR received information from the petitioners on the following dates: November 14, 2005; June 22, 2006; July 11, 2006; December 12, 2006; March 13, 2007; June 26, 2007; November 5, 2007; and April 16, 2008. Those communications were duly forwarded to the State. In addition, the IACHR received observations from the State on the following dates: March 28, 2006; May 15, 2006; August 28, 2006; January 15, 2007; May 4, 2007; August 24, 2007; and February 20, 2008. Those communications were duly forwarded to the petitioners.

### III. THE PARTIES' POSITIONS

#### A. The petitioners

5. According to the petitioners, Edgar Manuel De León Lemus was an officer in the Guatemalan Army from January 3, 1978, until May 1, 2003, when he was discharged. They report that for 25 years he held different positions, reaching the rank of Lieutenant Colonel of Infantry, with decorous conduct and respectful of his subordinates and his superiors. At the moment of his discharge he was being considering for a promotion to the rank of colonel.

6. They allege that on February 20, 2003, a sanction was imposed on Mr. Lemus of 30 days arrest for having shown up 27 hours and 30 minutes late after a one-day leave; the sanction was served. As justification for the delay, they allege that Mr. Lemus used the day of leave to work on a thesis he was preparing for his promotion; but that he had not been able to return within the established time frame because he was ill, a circumstance of which he informed his superiors by telephone.

7. They report that on April 11, 2003, the Office of the Chief of the High Command of National Defense (message No. DP18-11-01-18-0706) informed him that he would be discharged for "notorious misconduct and it being advisable as per the needs of the service" as of April 30, 2003. They allege that the message is illegal because it did not indicate the provision on which it was based, nor did it state the motives for accusing the alleged victim of "misconduct." They add that said decision should have been endorsed by a Board of Honor, in keeping with Articles 57 to 60 of the Law Constitutive of the Guatemalan Army. They indicate that on April 14, 2003, he was sent official note No. 3 W-a-00186-2003/ZNGT, informing him that he was excluded from promotion to the next rank because "your request for discharge" had been authorized. In this respect, they state that it is false that Mr. De León Lemus requested his discharge from the Army. They indicate that when he asked for copies of the active of notice of discharge they were not given to him, thereby violating his right to defense and due process.

8. They allege that on April 21, 2003, Mr. De León Lemus filed a motion for consideration (*recurso de revocatoria*) with the Ministry of Defense, against the messages of April 11 and 14, 2003. On April 29, 2003, he was told that the message of April 14, 2003, was annulled, and that he would be informed of the date for the defense of the thesis in due course. They state that with that communication an effort was made to make him believe that the promotion would go forward. Subsequently, on May 9, 2003, Mr. De León Lemus had received another message informing him that both messages were annulled. This is said to have confused the alleged victim.

9. With the resolution of the motion for reconsideration (*recurso de revocatoria*) pending, and with the omission, according to the petitioner, in respect of forming a Board of Honor to review his case<sup>1</sup>, they indicate that on May 1, 2003, General Order for Guatemalan Army Officers No. 5-2003 was issued, which included the decision to discharge him as of April 30, 2003. The relevant part of the General Order established that:

"it is resolved to discharge Lt. Col. Edgar Manuel De León Lemus: "because even though he has been warned at paragraph 73 of the General Order of the of the Army for Officers No. 08-2001, of September 30, 2001, that another fault would suffice for him to be subject to a more drastic

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<sup>1</sup> The petitioner cites the following articles of the Law Constitutive of the Guatemalan Army: Article 57: The Boards of Honor shall be made up in keeping with the provisions of the corresponding Regulation. They shall be convened to hear acts and omissions by the members of the Guatemalan Army when they do not constitute a criminal offense and it is considered that they may cause harm to the prestige, honor, or ethics of the Guatemalan Army or one of its members. The officers of the Guatemalan Army are under an obligation to constitute the Boards of Honor when called to do so, except in case of legal impediment. Article 58: The Boards of Honor may be convened at the institution's initiative or at the initiative of an Officer in whatever situation he may be. They shall be made up of officers who reside in the military jurisdiction in which the acts alleged or the most serious one have or has been committed. The Regulation to which the previous article refers shall determine the procedure to which its actions shall be subject, the term in which the matters that led to the constitution of the Board of Honor shall be heard and resolved, and the applicable sanctions. This same Regulation shall expressly establish the acts and omissions that harm the prestige, honor, and professional ethics of the Guatemalan Army or its members.

sanction, or discharge him from the Guatemalan Army, he ignored that warning, for on February 18, 2003, when on duty in military region IV ... he reported twenty-seven (27) hours and thirty (30) minutes after the end of regular leave, due to having consumed alcoholic beverages in excess, an attitude that not only casts light on his addiction to them, but that shows that he is a recidivist in committing grave faults against military discipline and ethics....”

10. They state that on including the resolution in an “Official Order,” it was a matter of public knowledge, to the detriment of his dignity, and that the ground stated for the discharge is false. They add that he also suffered detriment to his right to defense and to due process, because analyses and tests had to have been performed to show an addiction to alcoholic beverages. They argue that the authorities were seeking not to pay the compensation to which Mr. De León Lemus had a right for time of actual service.

11. Mr. De León Lemus filed an appeal for a rehearing (*recurso de reposición*) with the Ministry of Defense on May 5, 2003; it was denied on May 8, 2003, because the resolution challenged was not identified with precision.

12. They report that the motion for reconsideration was ruled inadmissible on June 12, 2003 (Resolution No. 3566 of the Ministry of Defense) and that the message challenged was upheld.

13. In view of the foregoing, on July 11, 2003, Mr. De León Lemus filed an *amparo* action with the Supreme Court of Justice against the Ministry of Defense alleging violation of his constitutional rights. On April 15, 2004, the Supreme Court rejected the *amparo* action for being manifestly unfounded. According to the petitioner, the rejection was based on the motion for reconsideration having been heard for defects both substantive and procedural; nonetheless he alleges that it is false because it was processed on the basis of according probative value to information from Military Intelligence, which alleges that it is an unauthorized structure, and therefore the evidence lacks any value.

14. They further indicate that Mr. De León Lemus filed a complaint with the Office of the Human Rights Ombudsman against the former Minister of Defense. On April 15, 2004, the Office of the Human Rights Ombudsman determined that the human right to dignity of Mr. De León Lemus had been violated given that his case, as it is based on a fault “against military discipline and ethics,” should have been submitted to a Board of Honor.

15. With the denial of the *amparo* action, on April 30, 2004, Mr. De León Lemus filed a motion for appeal to the Constitutional Court. On August 10, 2004, the Constitutional Court ruled that the appellant “used every remedy within reach” to exercise his right to defense, and a study of the proceedings reveals that the authority challenged acted within his powers on issuing the act challenged, which cannot be reviewed by this Court, especially because there is no evidence that the violation alleged has occurred....” In this regard, it is alleged that the evidence had been weighed “in manipulated fashion” and that there was no reference to what was resolved by the Office of the Human Rights Ombudsman.

16. It is also indicated that Mr. De León Lemus filed a criminal complaint on December 16, 2003, against the Minister of Defense for crimes of slander and defamation (*injuria* and *difamación*). The Twelfth Criminal Court (Tribunal Duodécimo de Sentencia Penal) ruled, after an intermediate phase of investigation and conciliation, not to admit the accusation, and not to open criminal proceedings against the person indicated in the complaint. This decision was upheld on appeal. It is indicated that for this reason a complaint was filed with the Board of Judicial Discipline against the judges of that Court, which had decided against it on final appeal by a motion for cassation filed with the Supreme Court.

17. In summary, they allege that Mr. De León Lemus’s right to due process was violated because he was denied the right to defense for failure to establish a Board of Honor, and given that he was sanctioned with 30 days arrest that he served and for the same fault he was subsequently discharged from the ranks of the Army. As for the establishment of a Board of Honor, they indicate that it was not possible to request its formation because they could not have guessed that he would be discharged pending the decision on the motion for reconsideration.

18. As for the admissibility requirements, they adduce that domestic remedies were exhausted and that the final judgment of the Constitutional Court was communicated to Mr. De León Lemus on September 16, 2004, at the Court itself.

## **B. The State**

19. The State argues that in the case of Lt. Col. Edgar De León Lemus there was no violation of the human rights alleged by the petitioners; accordingly, the procedures were in keeping with the laws and regulations of the Guatemalan Army. In this respect, first, it submitted the following record of sanctions imposed on Mr. De León Lemus:

- September 8, 1987: A sanction of eight days arrest was imposed for having arrived late to a meeting at the Center of Military Studies ordered by the National Defense High Command.
- August 5, 1994: with the rank of First Captain, a sanction of eight days arrest was imposed for not having reported in due course on an incident that occurred on August 3, 1994, and for visiting places not in keeping with his status as an Officer of the Guatemalan Army.
- July 24, 2000: With the rank of Lieutenant Colonel, he was sanctioned with eight days of arrest on having returned eight hours late from regular leave. The State notes that on that occasion the petitioner reported that his absence was due to the fact that the night before he ingested alcoholic beverages, which caused vomiting and diarrhea.
- June 30, 2001: Having the rank mentioned above, he was subjected to 30 days arrest for having returned 34 hours and 45 minutes late from regular leave. The State adds that on that occasion he was told that if he committed a new fault, he would be subject to a more “drastic” sanction.
- September 30, 2001: With the same rank, he was suspended from his employment for three months without salary given that after a review of his record of conduct, it was established that he was a recidivist in committing faults in violation of military discipline. The State reported that on this occasion he was 18 hours and 55 minutes late from a day of leave; he said that he had mechanical problems with his vehicle. It indicates that on that occasion he ingested alcoholic beverages and had then fallen asleep in his vehicle as a result of his drunkenness. It also indicates that he also was told that if he committed a new fault he would be sanctioned more “drastically” or that he would definitively be removed from the ranks of the Guatemalan Army.

20. As for the antecedents of the resolution that ordered the discharge of the alleged victim, the State argues that on February 18, 2003, Mr. Lemus left Military Zone No. 10 on regular leave, and was to report back on February 19, 2003, at 8:00 a.m. That day, given his absence, calls were made to his cell phone and his residence, yet it was not possible to establish communication. On February 20 at 1:00 a.m. Mr. De León Lemus communicated to Military Zone No. 10 indicating that he would appear later on February 20 because he wasn't feeling well. On February 20, 2003, at 11:30 p.m. he appeared at the Military Command, and was arrested for being absent without justified cause for 27 hours and 30 minutes.

21. The State indicates that when interviewed in this respect the alleged victim said: “On February 18, 2003, after resolving matters related to his thesis for the promotion, he devoted himself to ingesting alcoholic beverages, leading him to lose self-control; when he came to he was in Zone 10 of Guatemalan City. On February 20, 2003, at 9:00 a.m., he went in his vehicle to the Military Zone, to make appear and to report that he had no excuse for having committed a fault, and that he requested his discharge as of March 31, 2003.”

22. In that regard, it alleges that on March 31, 2003, the Office of the Chief of the National Defense High Command requested of the Minister of Defense that Lt. Col. of Infantry De León Lemus be definitively discharged from the Army effective April 30, 2003 for notorious misconduct. By message of April 9, 2003, the Minister of Defense authorized the discharge effective April 30, 2003. As for the relevant provisions, he notes that according to Decree 72-90 Law Constitutive of the Guatemalan Army: “The General Officers, Superior Officers, and Subaltern Officers of the Army shall be discharged for any of the following motives: ... (5) notorious misconduct determined by the National Defense High Command; ... (7) when it is advisable for the needs of the services.” He indicates that those grounds are

the ones referred to by the Ministry of Defense to proceed with the discharge of Mr. Edgar Manuel De León Lemus.

23. In addition, it indicates that the Regulations for Military Service in Peacetime establishes at Article 356: "Every officer who becomes inebriated while on active duty or carrying out a commission shall immediately be relieved and arrested, the report being forwarded to the superiors for their sanction; but if not on active duty and becomes inebriated and for this reason fails to carry out his obligations, he shall be punished in keeping with the magnitude of the fault. If said fault persists or recurs, he shall be discharged."

24. In addition, the State indicates that Article 10 of the Regulation of Disciplinary Sanctions establishes the table of sanctions.<sup>2</sup> In addition, it holds that all the administrative and judicial procedures were carried out with strict respect for due process guarantees. Moreover, it notes that the petitioner would not have been subject to a triple sanction. It indicates that the sanction of 30 days arrest that was imposed on Mr. De León Lemus was a preventive measure for a grave fault of military discipline, "taking into account his addiction to alcoholic beverages" and the military rank of Superior Officer that he held. In addition, on having been suspended from his employment for three months in keeping with paragraph 73 of the General Order of the Army for Officers No. 08-2001 of September 30, 2001, he was put on notice that with another fault he would be subject to a more drastic sanction, or would be discharged. Then, with the fault he committed in February 2003, he was discharged.

25. As for the remedies pursued by the petitioner, it adduces that on July 11, 2003, Mr. De León Lemus filed an *amparo* action with the Supreme Court of Justice, which was denied as "notoriously unfounded." The Court considered that "on complying with the specific regulation, the authority challenged did not violate the rights of the moving party, as he had the legal authority with respect to the administration, sanction, and promotion of high-ranking military officers." Mr. De León Lemus filed an appeal, and the Constitutional Court upheld the judgment, indicating his intention, in filing the *amparo*, of having the *amparo* court conduct a review of the judgment, which is not authorized by the Constitution of Guatemala.

26. It indicates that on December 16, 2003, Mr. De León Lemus filed a criminal complaint against the Ministry of Defense for the criminal offenses of slander and defamation (*injuria* and *difamación*). The Twelfth Criminal Court ruled on April 29, 2004: "There is no basis for opening a criminal proceeding against the person against whom the criminal complaint was directed." Subsequently, the same Court declared that the special appeal filed was inadmissible.

27. On January 2, 2004, the Office of the Ombudsman for Human Rights opened a case on a complaint filed by Mr. De León Lemus in which he indicated that his right to work had been violated. The Office of the Ombudsman declared that the right to dignity of Mr. De León had been violated, that the case should be reviewed by a Board of Honor, that there were indicia of responsibility of the former Minister of Defense, and that there would be no pronouncement on the merits given that a resolution was pending on the matter from the Supreme Court.

28. On the matter of Boards of Honor, the State argues that pursuant to Article 58 of the Law Constitutive of the Guatemalan Army, while they could be constituted at their *sua sponte*, there is no

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<sup>2</sup> That provision establishes:

Administrative Faults: A. Eight days arrest shall be imposed on one who, on leave or vacation, reports back for duty from two to eight hours late; 30 days arrest shall be imposed on one who, on leave or vacation, reports back for duty from one to two days late.

Faults of Military Ethics: A. Eight days of arrest shall be imposed: 1. On one who frequents places not in keeping with his status as an Officer; suspension of employment for three months shall be imposed: 1. On one who is a recidivist in committing faults of military discipline. In addition, a warning shall be given of a more drastic sanction in the event of a new fault. Definitive discharge from the Army shall be imposed: 1. On one who discredits an armed institution, by social acts. This sanction shall be imposed after a study of the case and recommendation by the National Defense High Command.

obligation to do so, and in the instant case the Ministry of Defense did not consider it necessary, given the prior record of misconduct. In addition, it notes that Mr. De León Lemus was able to request that it be constituted, but did not do so.

29. With respect to the motion for consideration filed on April 21, 2003, the State indicates that it was found inadmissible on procedural grounds (*improcedente*), since it may only be brought against administrative rulings. With respect to the appeal for a rehearing (*recurso de reposición*) of May 5, 2003, he indicated that it did not go forward because the appellant did not identify the resolution challenged with precision.

30. It argues, in summary, that the Ministry of Defense acted within the rules established for the Army and that Mr. De León Lemus had access to the remedies established in law, and if they were not resolved in his favor it does not imply a violation of his rights under the Convention.

31. Therefore, the State of Guatemala concludes that in the instant case there has been no violation of the human rights enshrined in the American Convention identified by the petitioner, by virtue of which the procedure employed by the Ministry of National Defense was done in keeping with the statutes and regulations of the Guatemalan Army.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. Competence of the Commission *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae***

32. The petitioners are authorized by Article 44 of the American Convention to present petitions on behalf of the alleged victim with respect to whom the State of Guatemala undertook to respect and guarantee the rights enshrined in the American Convention. Therefore, the Commission is competent *ratione personae* to examine the petition.

33. In addition, the Commission is competent *ratione loci* to hear the petition, insofar as it alleges violations of rights protected in the American Convention said to have taken place under the jurisdiction of the State. The Commission is competent *ratione temporis* insofar as the facts alleged are said to have taken place when the obligation to respect and ensure the rights established in the Convention was already in force for Guatemala, which ratified the American Convention on May 25, 1978.

34. Finally, the Commission is competent *ratione materiae* to hear the instant case, for the petition alleges possible violations of human rights protected by the American Convention.

##### **B. Other requirements for the admissibility of a petition**

###### **1. Exhaustion of domestic remedies**

35. Article 46(1)(a) of the American Convention provides that in order for a complaint to be filed with the Inter-American Commission pursuant to Article 44 of the Convention, domestic remedies must first be pursued and exhausted in keeping with generally recognized principles of international law. This requirement has the purpose of making it possible for the domestic authorities to take cognizance of the alleged violation of a right protected and, if appropriate, to resolve it before it is heard by an international body.

36. On a preliminary basis, the Commission notes that for the purposes of determining whether the Convention requirement of prior exhaustion of domestic remedies has been satisfied, one must specify the purpose of the claim and analyze whether suitable remedies were pursued to remedy the situation alleged. In this context, the Commission notes that the purpose of the claim in the instant case refers to the alleged arbitrary discharge of Mr. De León Lemus from the ranks of the Guatemalan Army without regard to due process and the consequent lack of judicial protection.

37. In this respect, from the information produced by the parties it appears that there is no dispute in terms of the judicial remedies pursued by Mr. De León Lemus to bring a claim domestically for the alleged violations, or in terms of the results.

38. In effect, the Commission observes that Mr. De León Lemus pursued a series of remedies domestically, among which the *amparo* action can be considered valid for litigating alleged violations of the guarantees and rights that were considered violated. It is important to note that an *amparo* action is conceived of in the Guatemalan legal order as a broad action for the protection of rights considered impaired, given that it is established that the *amparo* is an action to uphold constitutional guarantees, given that it may be brought by a person "to maintain or have restored the enjoyment of the rights and guarantees established by the Constitution or any other law."<sup>3</sup>

39. The Commission observes that in the *amparo* action the alleged victim raised before the judicial body the violations of due process that he considered had taken place in his discharge from the Army, indicating that his right to work was violated, along with his rights to equality and defense. For this reason, the Commission considers that the subject matter of the petition was presented to the domestic courts using a remedy that could have been suitable and effective for resolving this type of situation domestically.

In view of the foregoing, the Commission considers that in the instant case Mr. De León Lemus exhausted a remedy that was available and suitable for remedying the situation alleged and therefore the Convention requirement is met with the judgment that decided that action on final appeal. **2.**

#### **Deadline for filing a petition**

40. Article 46(1)(b) of the Convention establishes that for a petition to be declared admissible it must be submitted within six months counted from the date on which the interested person was notified of the final decision in the domestic jurisdiction.

41. In the instant case, the Commission observes that the judgment of the Constitutional Court that decided on final appeal of the *amparo* action filed by the alleged issue was issued on August 10, 2004, and notice of it was given on September 16, 2004; and that the petition against the State of Guatemala was filed with the Commission on November 4, 2004. Accordingly, the Commission concludes that this Convention requirement has been satisfied.

#### **3. Duplication of procedures and international *res judicata***

42. Article 46(1)(c) provides that the admission of the petitions is subject to the requirement that the matter "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission shall not admit the petition if it "is substantially the same as one previously studied by the Commission or by another international organization."

43. In this respect, the IACHR observes that it does not appear from the record that the subject matter of the petition is pending decision in another international proceeding for settlement, or that it is substantially the same as one already studied by this or another international organization. Therefore, the requirements established in those articles have been met.

#### **4. Characterization of the facts alleged**

44. For the purposes of admissibility, the IACHR must consider at this point whether there are facts which, if proved, may characterize violations of the American Convention, as stipulated in its Article 47.b, and if the petition is "manifestly groundless" or if it is "obviously out of order", according to paragraph (c) of the same instrument.

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<sup>3</sup> Law on *Amparo*, Habeas Corpus, and Constitutionality, Decree 1-86, Articles 8 and 10.

45. In the instant case the petitioners allege that the State is responsible based on Mr. De León Lemus having been discharged from the ranks of the Army with disregard for due process; violating his dignity; and without having been afforded judicial protection despite having turned to the justice system. The State, for its part, alleges that in the instant case there has not been any violation of the human rights enshrined in the American Convention, since the procedure used by the Ministry of National Defense was carried out in keeping with the provisions of law and regulations of the Guatemalan Army.

46. In this respect, the Commission observes that Mr. De León Lemus pursued a series of administrative and judicial remedies, which concluded rejecting his claim. For the purposes of this section, one should mention the final decision on the judicial remedies pursued by way of the *amparo* and constitutional guarantees jurisdictions. In effect, on April 15, 2004, the Commission observes that the Supreme Court of Justice denied as “notoriously unfounded” the *amparo* action filed by Mr. De León Lemus against the Ministry of National Defense to question the relevant section of General Order of the Army No 5-2003, by which he was discharged from the Army; he alleged in that appeal that his rights to defense, due process, equality, and work had been violated. In the relevant section of the *amparo* judgment, the Court established:

This Court considers that on enforcing the specific regulation, the authority challenged did not violate the moving party’s rights, as it has the legal authority with respect to the administration, sanction, and promotion of high-ranking military officers. Accordingly it is concluded that the moving party was not caused any harm, or detriment to his constitutional guarantees, on applying the legal provisions described to him, since the law authorized the Ministry of National Defense to remove him from the service mindful of the faults committed, which he sought to challenge, nor make reference to the number of General Order of the Army for Officers number five hyphen two thousand three (05-2003), nor the point at which that resolution was contained. Accordingly there is no evidence of the violations that the moving party adduces, hence having analyzed the matter, the *amparo* is denied notoriously unfounded....<sup>4</sup>

47. On April 30, 2004, Mr. De León Lemus filed an appeal before the Constitutional Court of Guatemala “against the entire contents of the judgment” of April 15, 2004. Said Court rejected the action, considering it notoriously unfounded, and proceeded to affirm the *amparo* judgment that was challenged. Specifically, the Court said:

In the instant case, Edgar Manuel De León Lemus alleges as a violation of his rights to defense, action, and equality, and the principle of due process, resolution five-two thousand three, issued by the Ministry of National Defense – the authority challenged – which orders moving party’s discharge from the ranks of the Armed Institution; with that resolution his rights are violated, since it was issued to impede the completion of his thesis, with which he was to be promoted to the next highest rank within the armed institution, in addition to the faults, which were the basis for issuing the act challenged, had been sanctioned; the moving party indicated finally that he was sanctioned three times, for he was arrested, removed from his position, and discharged from the army.

The Court of *Amparo* of First Degree denied this action on considering that the authority challenged did not violate the moving party’s rights on issuing the act challenged, for it acted in keeping with the specific regulation, which confers on it the authority with respect to the administration, sanction, and promotion of high-ranking military officers, thus there is no harm or detriment to the constitutional guarantees of the moving party that can be repaired by this means, a view shared by this Court, since the moving party pursued all the remedies available to him to exercise his right to defense, and, from the study of the proceedings it appears that the authority challenged acted within its powers on issuing the act challenged, which cannot be reviewed by this Court, especially because there is no evidence that the violation alleged has occurred, for no harm is caused to the moving party that can be repaired by this means, his intent to have the *amparo* court sit as a court of review being manifest[...]<sup>5</sup>

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<sup>4</sup> Supreme Court of Justice of Guatemala, Sitting as Court of *Amparo*, judgment of April 15, 2004.

<sup>5</sup> Constitutional Court of Guatemala, Case No. 899-2004, judgment of August 10, 2004.



48. In this respect, the Commission considers it important to note that according to the case-law of the inter-American system, it is not authorized to review “decisions handed down by national courts acting within their authority and applying the appropriate legal guarantees, unless it is found that there has been a violation of some right protected by the Convention.”<sup>6</sup> The Commission has argued repeatedly in this respect that:

Under the preamble of the American Convention on Human Rights, the protection that the organs of the inter-American system for the protection of human rights offers is intended to complement the protection afforded by the local courts. The Commission cannot take upon itself the functions of an appeals court in order to examine alleged errors of fact or law that local courts may have committed while acting within the scope of their jurisdiction, unless there is unequivocal evidence that the guarantees of due process recognized in the American Convention have been violated.<sup>7</sup>

49. Accordingly, the Commission lacks competence to substitute its judgment for that of the domestic courts on issues that involve the interpretation and explanation of domestic law or the consideration of the facts. Therefore, the judicial protection that the Convention recognizes includes the right to fair, impartial, and swift procedures that afford the possibility, but not the guarantee, of a favorable outcome.<sup>8</sup> Accordingly, the interpretation of the law, the relevant procedure, and the weighing of the evidence, among other things, fall within the performance of its function by the domestic jurisdiction, which cannot be replaced by the IACHR.<sup>9</sup>

50. In light of the foregoing considerations, what arises from the parties’ arguments and the documents produced is that the domestic courts rejected the remedies pursued by the petition, considering that the constitutional rights argued had not been violated, based on the interpretation of the applicable domestic legislation; this interpretation corresponds, in principle, to the domestic judicial authorities, and that in this case no issue is raised under the American Convention that tends to establish a potential violation of it, and that authorizes the Commission’s intervention.

51. In addition, in the instant case, the Commission does not have any information or evidence that would allow it to make inferences from the judicial procedures acts or omissions that tend to establish violations of due process under the American Convention.

52. From that perspective, the purpose of the petition would be a request to review decisions in the domestic jurisdiction, given that there is no evidence of a manifestly arbitrary act in the process, and the bases of the judgments mentioned are, *prima facie*, objective and reasonable.

53. In summary, from the arguments of the parties and the evidence in the record, one finds no fact that tend to establish a violation of the right to judicial protection and judicial guarantees or that the alleged victim’s access to domestic remedies has been impeded. The Commission concludes that in light of the foregoing, the facts alleged do not tend to establish a violation of rights recognized in the American Convention, and therefore the petition must be declared inadmissible.

## V. CONCLUSION

54. Based on the arguments of fact and law set forth above, the Inter-American Commission concludes that the petition is inadmissible pursuant to Article 47(b) of the American Convention, since it does not state facts that constitute a violation of the rights protected by said Convention.

55. In view of the foregoing considerations,

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<sup>6</sup> IACHR, Report No. 8/98, Case 11,671, *Carlos García Saccone* (Argentina), March 2, 1998, para. 53.

<sup>7</sup> IACHR, Report No.122/01, Petition 0015/00, *Wilma Rosa Posadas* (Argentina), October 10, 2001, para. 10.

<sup>8</sup> IACHR, Report No. 39/96, Case 11,773, *S. Marzioni*, Argentina, October 15, 1996, Report No. 48/98, Case 11,403, *Carlos Alberto Marín Ramírez* (Colombia), September 29, 1998, para. 42.

<sup>9</sup> IACHR, Report No. 39/05 (Peru), Petition 792/01, *Carlos Iparraguirre and Luz Amada Vásquez de Iparraguirre*, March 9, 2005.

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**DECIDES:**

1. To declare the instant petition inadmissible, pursuant to Article 47(b) of the Convention.
2. To forward this report to the petitioners and the State.
3. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 20<sup>th</sup> day of the month of March 2012.  
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.