

OEA/Ser.L/V/II.150
Doc. 192
21 December 2018
Original: Spanish

REPORT No. 167/18
CASE 12.957
FRIENDLY SETTLEMENT REPORT

LUIS BOLIVAR HERNANDEZ PEÑAHERRERA
ECUADOR

Approved electronically by the Commission on December 21, 2018

Cite as: IACHR, Report No. 167/18, Case 12.957. Friendly Settlement. Luis Bolivar Hernandez Peñaherrera. Ecuador. December 21, 2018.



REPORT No. 167/18
CASE 12.957
FRIENDLY SETTLEMENT
LUIS BOLIVAR HERNANDEZ PEÑAHERRERA
ECUADOR
DECEMBER 21, 2016

I. SUMMARY AND RELEVANT PROCEDURAL ASPECTS OF THE FRIENDLY SETTLEMENT BEFORE THE IACHR

1. On March 13, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission”, or “the IACHR”) received a petition against the Republic of Ecuador (“Ecuador” or “the State”), originally filed by Alejandro Ponce Villacís and Mr. Luis Bolivar Hernandez Peñaherrera, who subsequently credited his representation to Mr. Inigo Salvador Crepos (hereinafter “the petitioner” or “the petitioners”), in replacement of Mr. Ponce Villacís.

2. The petitioner argued that, in the context of the evaluation process for his promotion to the rank of Brigadier General, Mr. Peñaherrera was denied promotion for a purported lack of suitability to the position. It is alleged that, despite meeting all the legal requirements for such purposes, the petitioner was prevented from continuing his military career without having the responsible military authorities explain the reasons why he was considered “ineligible” for promotion. The petitioner asserted that this actually consisted of an act of retaliation against Mr. Hernandez Peñaherrera for promoting the admission of women officers into the Armed Forces. Furthermore, they claimed that the victim lacked adequate and effective resources to properly take notice of the reasons why he had been denied promotion or request a review of the decision.

3. On July 21, 2014, the IACHR approved its Admissibility Report No. 53/14 declaring the claim admissible for the alleged violation of human rights enshrined in Articles 8 (Right to a fair trial), 13 (Right to freedom of thought and expression), 24 (Right to equal protection) and 25 (Right to judicial protection) in relation to Article 1.1 of the American Convention on Human Rights (“American Convention”). The Commission also established the inadmissibility of the claim with regards the alleged violation of Articles 2 and 11 of the American Convention. Additionally, it decided to notify the parties on the decision of the report and determined its publication on the IACHR’s Annual Report.

4. On October 2017, the petitioner informed about his will to initiate a friendly settlement procedure, which the State agreed to on March 13, 2018. On September 24, 2018, the parties signed a friendly settlement agreement. On October 10, 2018, the State requested the Commission to proceed with the homologation of the agreement, in light of Article 49 of the American Convention on Human Rights, request endorsed by the petitioner on October 29, 2018.

5. As prescribed in Article 49 of the Convention and Article 40.5 of the Commission’s Rules of Procedure, the friendly settlement report summarizes the facts alleged by the petitioner, reproduces de friendly settlement agreement signed on September 24, 2018, between the petitioner and the State of Ecuador, and includes an assessment on the degree of compliance with the agreement. Additionally, it describes the findings relating to the compatibility standard between the friendly settlement agreement and the objects and purposes of the Convention. Furthermore, the Commission decides to publish this report and include it in the Annual Report of the IACHR to the General Assembly of the Organization of American States.

II. ALLEGED FACTS

6. The petitioner argued that Mr. Peñaherrera was a member of the Ecuadorean Army on active duty, institution where he attained the rank of Colonel of the Joint Staff, They also pointed out that Mr. Peñaherrera earned important decorations during his military career and was never subject to disciplinary acts or other proceedings of similar character.

7. They indicated that, throughout his mandate as director of the “Eloy Alfaro” Military School, Mr. Peñaherrera fomented the admission of women in the Army by admitting the first female cadets (officer candidates) on October 1999. The petitioner asserted that the Army and the Armed Forces in general had traditionally opposed the entry of female officers, and that the admission of the first class of female cadets met great resistance on the part of a group of generals. They indicated that, from the commencement of this initiative onwards, Mr. Peñaherrera’s superiors made him aware “in various ways” of their disapproval of the openness and admission of women to the Army. They claimed that, despite the foregoing, Mr. Peñaherrera continued to recruit and train the female cadets.

8. The petitioner asserted that on June 21, 2001, the Council of Generals of the Army assembled to determine which colonels would be promoted and, the following day, the victim was informed that he was not “suitable” for promotion. They argued that the decision provided no explanation on the alleged lack of suitability albeit Mr. Peñaherrera met all of the legal requirements for promotion in rank. They pointed out that it was signaled to him through unofficial channels that his mistake had been that “he had moved too forward with the issue of women admission.”

9. Throughout the following years, the petitioner filed a series of revision procedures, within the Ecuadorian domestic legal system, with regards the rank advancement, where the petitioner alleged violations to distinct constitutional rights, but did not succeed in obtaining an official answer that informed him on why he was framed as “unsuitable” for the promotion.

III. FRIENDLY SETTLEMENT

10. On September 24, 2018, in the city of Quito, the State of Ecuador, represented by Diego Regalado Almeida, the State Attorney General [*Procurador General del Estado*], and the petitioner signed a friendly settlement agreement containing the following provisions:

**FRIENDLY SETTLEMENT AGREEMENT
IACHR, REPORT ON ADMISSIBILITY NO. 53/14
Case No. 12.957
LUIS BOLIVAR HERNANDEZ PEÑAHERRERA**

FIRST: PARTIES

Appearing at the signing of this friendly settlement agreement are, for one of the parties, Dr. Diego Regalado Almeida, Attorney General of the State, subrogate, whose standing is attested by the attached Agreement No. 002 of September 21, 2018; and, for the other party, Mr. Luis Bolivar Hernandez Peñaherrera, holder of citizenship card No. [XXX], who appears on his own behalf as the victim.

SECOND: BACKGROUND

On March 13, 2003, Mr. Luis Bolivar Hernandez Peñaherrera filed a petition with the Inter-American Commission on Human Rights (IACHR), alleging the responsibility of the Republic of Ecuador for alleged violations of due process committed to his detriment, as well as the responsibility of the Ecuadorian State for violation of the right to a fair trial, the right to privacy, freedom of thought and expression, the right to equal protection, and the right to judicial protection, in addition to failure to discharge its obligation to adopt provisions under domestic law.

On August 6, 2014, the Inter-American Commission on Human Rights notified the Ecuadorian State of its Report on Admissibility No. 53/14 of July 21, 2014,¹ in which it decided “[t]o find the petition admissible as to Articles 8 [right to a fair trial], 13 [freedom of thought and expression], 24 [right to equal protection] and 25 [right to judicial protection], in connection with Article 1.1 of the American Convention”.² In that notice, the Commission also placed itself at the disposal of the parties for the purposes of reaching a friendly settlement.

On July 3, 2017, Mr. Julio Fernando Bueno Arevalo, counsel to the Office of the President of the Republic, sent Official Letter No. PR-SGPR-2017-1975-0³ to the Vice Minister of National Defense, enclosing IACHR Report on Admissibility No. 53/14 regarding the case of Luis Bolivar Hernandez Peñaherrera v. Ecuador for analysis and a response to the petitioner. On July 4, 2017, the Vice Minister of National Defense forwarded the case via Quipux to the Office of the General Coordinator of Legal Counsel Matters of the Ministry of National Defense.

Through Memoranda No. MDN-JUR-2017-0515-ME of July 12, 2017 and No. MDN-JUR-2017-0553-ME of July 19, 2017,⁴ the Office of the General Coordinator of Legal Counsel forwarded documents relating to the case brought by Luis Bolivar Hernandez Peñaherrera to the Directorate for Human Rights, Gender, and International Humanitarian Law of the Ministry of National Defense for analysis and processing as appropriate.

On July 17, 2017, Luis Bolivar Hernandez Peñaherrera presented an unnumbered written communication to Miguel Carvajal, Minister of National Defense, saying:

[...] This is to respectfully request, Minister, that you kindly grant me an audience in order to enable me to express my wish to seek a friendly settlement in my case before the IACHR against the Ecuadorian State, which was found admissible by said Commission in July 2014 [...].⁵

On September 15, 2017, the Constitutional President of the Republic of Ecuador, Lenín Moreno Garces, issued Executive Decree No. 159, which contains the following provisions:

[...] Article 1. To accept the resignation of Miguel Angel Carvajal Aguirre from his post as Minister of National Defense and to thank him for his invaluable and loyal service to the Ecuadorian State as head of that government portfolio. Article 2. To appoint Patricio Zambrano Restrepo to the post of Minister of National Defense [...].

On October 2, 2017, Luis Bolivar Hernandez Peñaherrera sent a communication to Patricio Zambrano Restrepo, Minister of National Defense, in which he expressed his interest in continuing the activities aimed at reaching a friendly settlement of his case, saying, “this is to respectfully request that you kindly allow the continuation of the activities initiated by Dr. Miguel Carvajal with a view to reaching a friendly settlement of my case, which was admitted by the Inter-American Commission on Human Rights [...]”.⁶

¹ OAS, Inter-American Commission on Human Rights, Report No. 53/14, Case No. 12.957, Report on Admissibility, Luis Bolivar Hernandez Peñaherrera, Ecuador, July 21, 2014.

² Ibid, par. 47(1).

³ EC. 2017. Official letter No. PR-SGPR-2017-1975-0 of July 3, 2017.

⁴ EC. 2017. Official Letters Nos. MDN-JUR-2017-0515-ME of July 12, 2017, and MDN-JUR-2017-0553-ME of July 19, 2017.

⁵ Unnumbered communication of July 17, 2017, presented by Luis Bolivar Hernandez Peñaherrera.

⁶ Unnumbered written communication of October 2, 2017, presented by Luis Bolivar Hernandez Peñaherrera to the Ministry of National Defense.

On October 5, 2017, by Memorandum No. MDN-DDH-2017-0200-ME, the Directorate for Human Rights, Gender, and International Humanitarian Law issued a report on the case in which it recommended to the Minister of National Defense that “[...] the viability of a friendly settlement between the parties be explored in accordance with Articles 48 of the Convention and 40 of the Rules of Procedure of the Commission, in light of the benefit to the state and the victim [...].”⁷

On November 9, 2017, the General Coordinator of Legal Counsel of the Ministry of National Defense issued Memorandum No. MDN-JUR-2017-1028-ME enclosing a report on Case No. 12.957 regarding Colonel (RET.) Luis Bolivar Hernandez Peñaherrera, which recommended that the Minister of National Defense “[...] convey the request for a friendly settlement presented by Colonel (RET.) Luis Bolivar Hernandez Peñaherrera to the National Director for Human Rights of the Office of the Attorney General of the State so that the propriety of the agreement might be analyzed [...].”⁸

On November 15, 2017, the Minister of National Defense sent the Attorney General of the State Official Letter No. MDN-MDN-2017-0965-OF⁹ drawing his attention to the request of Luis Bolivar Hernandez Peñaherrera to reach a friendly settlement in relation to his case, which had been admitted by the Inter-American Commission on Human Rights, and requesting that the case be analyzed with a view to initiating the friendly settlement process.

On December 11, 2017, Luis Bolivar Hernandez Peñaherrera sent the Minister of National Defense an unnumbered letter setting out for consideration his positions and requests with regard to the friendly settlement, specifically proposing the following:

1. [...] That Colonel Luis Bolivar Hernandez Peñaherrera, on account of having received the highest grades in his class and of having been decorated by the Ecuadorian State with the *Cruz al Mérito de Guerra* [Merit of Service Cross] for his service in the Alto Cenepa campaign, be reclassified and that by ministerial general order he be promoted to the rank of brigadier general and immediately discharged from the Armed Forces.
2. That Colonel Luis Bolivar Hernandez Peñaherrera hereby states that he does not aspire to any financial compensation, whether material or otherwise, since his struggle has been for the truth, justice, and respect for his constitutional rights.
3. That Colonel Luis Bolivar Hernandez Peñaherrera, in light of the friendly settlement, undertakes immediately to submit to the Inter-American Commission on Human Rights a request for the case to be withdrawn and archived [...].¹⁰

On December 19, 2017, Luis Bolivar Hernandez Peñaherrera sent the Minister of National Defense an unnumbered letter specifying his requests, namely:

1. [...] That Colonel Luis Bolivar Hernandez Peñaherrera, on account of having received the highest grades in his class and of having been decorated by the Ecuadorian State with the *Cruz al Mérito de Guerra* [Merit of Service Cross] for his service in the Alto Cenepa campaign,

⁷ Report containing recommendations issued by the Directorate for Human Rights, Gender, and International Law, dated October 5, 2017.

⁸ EC. 2017. Memorandum No. MDN-JUR-2017-1028-ME of November 9, 2017, enclosing the report containing the recommendations of the Office of the General Coordinator of Legal Counsel of the Ministry of National Defense to the Minister of National Defense.

⁹ EC. 2017. Official letter No. MDN-MDN-2017-0965-OF of November 15, 2017, from the Minister of National Defense to the Attorney General of the State.

¹⁰ Unnumbered letter of December 11, 2017, signed by Luis Bolivar Hernandez Peñaherrera, notifying the Ministry of National Defense of his requests in relation to the friendly settlement agreement.

be reclassified and that by ministerial general order he be promoted to the rank of brigadier general and immediately discharged from the Armed Forces.

2. That Colonel Luis Bolivar Hernandez Peñaherrera hereby states that he does not aspire to reinstatement in active service.

3. That Colonel Luis Bolivar Hernandez Peñaherrera hereby states that he does not aspire to any financial compensation, since his struggle has been for the truth, justice, and respect for his constitutional rights. Such outlays as are made by way of social security benefits are the result of the promotion to brigadier general, not of any indemnification or reparation, which aspect will be considered for calculation of the mathematical reserve.

4. That Colonel Luis Bolivar Hernandez Peñaherrera, in light of the friendly settlement, undertakes immediately to submit to the Inter-American Commission on Human Rights a request for the case to be withdrawn and archived [...].¹¹

On January 12, 2018, the General Coordinator of Legal Counsel sent an email to the National Director for Human Rights of the Office of the Attorney General forwarding the unnumbered letter setting out positions and requirements dated December 19, 2017, signed by Luis Bolivar Hernandez Peñaherrera.

On January 19, 2018, the National Director for Human Rights of the Office of the Attorney General, sent Official Letter No. 13693 of January 19, 2018, to the General Coordinator of Legal Counsel of the Ministry of National Defense, inviting him to a working meeting on January 24, 2018 at 10 a.m. to “analyze the requests of Mr. Hernandez contained in the unnumbered official letter of December 19, 2017.”¹²

At the working meeting on January 24, 2018, the Office of the Attorney General explained the friendly settlement procedure before the Inter-American Commission on Human Rights both to the General Coordinator of Legal Counsel of the Ministry of National Defense and to Luis Bolivar Hernandez Peñaherrera.

On January 24, 2018, Luis Bolivar Hernandez Peñaherrera sent an email to the National Directorate for Human Rights of the Office of the Attorney General, saying, “I wish to state my express desire for a friendly settlement in relation to my constant case in said proceeding. I would also be grateful if this decision would kindly be notified to the Inter-American Commission on Human Rights for the relevant purposes.”¹³

On April 23, 2018, the Minister of National Defense sent Official Letter No. MDN-MDN-2018-0531-OF to Luis Bolivar Hernandez Peñaherrera notifying him of the official counterproposal.

For his part, Colonel (RET.) Luis Hernandez expressed his acceptance by an unnumbered official letter dated April 23, 2018:

[...] I have the pleasure to acknowledge receipt of your kind communication No. MDN-MDN-2018-531-OF of April 23, 2018, with reference to Case No. 12.957 that I have brought against the Ecuadorian State before the IACHR. In that regard, I should like, Minister, to express my

¹¹ Unnumbered letter of December 19, 2017, signed by Luis Bolivar Hernandez Peñaherrera, notifying the Ministry of National Defense of his requests in relation to the friendly settlement agreement.

¹² EC. 2018, Official letter No. 19 ENE 2018 from the National Director for Human Rights of the Office of the Attorney General.

¹³ Email sent by Luis Bolivar Hernandez Peñaherrera to the National Directorate for Human Rights of the Office of the Attorney General, at 11:15 a.m. on January 24, 2018.

full agreement with the counterproposal presented by the Ministry of National Defense for reaching a friendly settlement of my petition.

The Ecuadorian State, in strict compliance with the obligations that it acquired with its ratification of the American Convention on Human Rights and other instruments of international law on human rights, is mindful that every violation of an international obligation which results in harm creates a duty to make comprehensive reparation.

Therefore, the Ministry of National Defense, by virtue of its authority, and Mr. Luis Bolivar Hernandez Peñaherrera, an Ecuadorian citizen with identity document No. 170309974-5, acting within his rights, without coercion of any sort but of his own volition and initiative, have resolved to reach a friendly settlement, in accordance with the provisions contained in Articles 48(1)(f) of the American Convention on Human Rights and 40 of the Rules of Procedure of the Inter-American Commission on Human Rights.

In that context, on April 26, 2018, the Ministry of National Defense, by official letter No. MDN-MDN-2018-0542-OF addressed to the then-Attorney General, requested:

Within the framework of your authority and in order to continue the process and sign the friendly settlement agreement with Mr. Luis Bolivar Hernandez Peñaherrera; I enclose herewith all the documentation that will enable the agreement to be signed.

THIRD: FACTS IN THE CASE

As shown by Report on Admissibility No. 53/14, Petition No. 202-03 (currently Case No. 12.957), the Commission considered, in particular, the following facts:

In that context, the Inter-American Commission on Human Rights referred to the following:

The petitioners contend that the alleged victim was a member of the Ecuadorean Army on active duty, attained the rank of Colonel of the Joint Staff, served as Director of the Eloy Alfaro Advanced Military School (Escuela Superior Militar Eloy Alfaro), and was publically recognized as a “hero” for his performance in the “Alto-Cenepa War.” They point out that the alleged victim received important decorations during his military career and was never subject to disciplinary or other proceedings.¹⁴

The report also stated:

[...] that during his tenure as director of the “Eloy Alfaro” Military School, the alleged victim opened the door to women in the Army by admitting the first female cadets (officer candidates) in October 1999. They explain that the Army and the Armed Forces in general had traditionally opposed the entry of female officers and that the entry of the first class of female cadets met great resistance on the part of a group of generals. They indicate that, from the outset of this initiative, his superiors made him aware “in various ways” of their disapproval of opening the door and admitting women to the army. They claim that despite the foregoing, the alleged victim continued to train the woman cadets.¹⁵

The report also found:

¹⁴ OAS, Inter-American Commission on Human Rights, Report No. 53/14, Case No. 12.957, Report on Admissibility, Luis Bolivar Hernandez Peñaherrera, Ecuador, July 21, 2014 (Positions of the parties, par. 7).

¹⁵ Ibid., par. 8.

[...] that on June 21, 2001, the Council of Generals of the Army (hereinafter the “COGFT”) assembled to determine which colonels would be promoted and, the following day, the alleged victim was informed that he was not “eligible” for promotion. They contend that the decision provided no explanation of why the alleged victim was considered ineligible despite having met all of the legal requirements for promotion in rank. They indicate that it was conveyed to him through unofficial channels that his mistake had been that “he had gotten too far with the issue of admittance of women.”¹⁶

The report also said:

[...] that on June 27, 2001, the alleged victim filed a motion for reconsideration of the decision, within the five-day period, as established by the Rules of the Council of Generals of the Armed Forces, arguing a violation of his constitutional rights based on the absence of any grounds for denial of promotion. In this connection, they claim that, in violation of procedure and the stipulated regulatory period, the COGFT [for its initials in Spanish] met on June 28, 2001, and confirmed its decision without indicating the reasons.¹⁷

The report also indicated:

[...] that the alleged victim subsequently appealed to the Supreme Council of the Armed Forces (hereinafter the “CSFA”) on the grounds of failure to specify the basis or reasons for the decision and an alleged violation of his right to a defense. On August 2, 2001, the CSFA informed him that he must appeal to the Council of Senior Officers of the Army. They report that the alleged victim applied to said Council, which denied his application on August 9, 2001 “without mentioning the constitutional issues raised.”¹⁸

The report also found:

[...] that the alleged victim submitted a new request for review to the Council of Senior Officers of the Army, but that on August 23, 2001 the Council denied the request and sent the case to the Supreme Council of the Armed Forces for appeal. On October 30, 2001, the CSFA denied the appeal and confirmed the contested decisions. The petitioners report that, once again, no reasons were given for the decision, and that a majority of the generals on the Council of Senior Officers of the Armed Forces were also on the Supreme Council of the Armed Forces.¹⁹

Finally, the report on admissibility indicated that:

On November 12, 2001, the alleged victim filed a petition for constitutional relief [*Amparo*] with the District Court for Administrative Matters, which found in his favor in its decision of December 12, 2001, and ordered the Council of Officers of the Army to reevaluate and reanalyze the alleged victim’s eligibility in a reasoned decision. On July 30, 2002, representatives of the Armed Forces filed an appeal of this decision with the Constitutional Court, which on September 10, 2002 reversed the decision of the District Court for Administrative Matters and denied the petition for *Amparo* because the remedy did not meet the requirements for admissibility; in other words, because the decisions for which the alleged victim had requested stays of execution were “lawful” decisions by a public authority and not obviously arbitrary.²⁰

¹⁶ Ibid., par. 9.

¹⁷ Ibid., par. 10.

¹⁸ Ibid., par. 11.

¹⁹ Ibid., par. 12.

²⁰ Ibid., par. 34.

On March 13, 2003, Mr. Luis Bolivar Hernandez Peñaherrera filed a petition with the Inter-American Commission on Human Rights, alleging the responsibility of the Republic of Ecuador “for alleged violations of due process committed to his detriment, [...] in the context of the evaluation process for his promotion to the rank of Brigadier General, which he was denied for alleged unsuitability [...].”²¹

In response to the petition lodged by Luis Bolivar Hernandez Peñaherrera with the Inter-American Commission on Human Rights, on July 21, 2014, the Commission adopted Report on Admissibility No. 53/14, Petition 202-03, Luis Bolivar Hernandez Peñaherrera, Ecuador.

FOURTH: RESPONSIBILITY OF THE STATE UNDER THE ARTICLES DECLARED ADMISSIBLE BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

In this regard, the Inter-American Commission on Human Rights found:

The petitioners are entitled, under Article 44 of the American Convention, to file complaints with the Commission. The petition identifies as the alleged victim an individual, for whom the Ecuadorean State undertook to respect and ensure the rights enshrined in the American Convention. As for the State, the Commission notes that Ecuador has been a party to the American Convention since December 28, 1977, when it deposited the requisite instrument of ratification.²²

The Commission also found:

The Commission is competent *ratione temporis* because the obligation to respect and ensure the rights protected in the American Convention was already in effect on the State at the time when the facts alleged in the petition took place. Lastly, the Commission is competent *ratione materiae*, inasmuch as the petition charges potential violations of human rights protected under the Convention.²³

In that context, the Inter-American Commission on Human Rights decided: “1. To find the petition admissible as to Articles 8, 13, 24 and 25, in connection with Article 1.1 of the American Convention.²⁴

It is necessary to point out, that pursuant to Article 40 of the Rules Procedure of the Inter-American Commission on Human Rights and Articles 48 and 49 of the American Convention on Human Rights, the friendly settlement agreement puts an end to the international dispute, for which reason there is no judgment against the Ecuadorian State and, therefore, the agreement produces no jurisprudence.

Finally, it should be mentioned that the Ministry of National Defense, in its Technical Advisory Report on Human Rights forwarded to the Office of the Attorney General by Official Communication No. MDN-MDN-2018-0542-OF of April 26, 2018, stated that “bearing in mind the importance of ensuring the rights under discussion, the Ecuadorian State shall recognize its international responsibility for violation of the human rights recognized in Articles 8, 13, 24, and 25,” as is confirmed by the present Agreement.

FIFTH: BENEFICIARY OF THE AGREEMENT

²¹ Ibid., par. 1.

²² Ibid., par. 26.

²³ Ibid., par. 27.

²⁴ Ibid., Decision, par. 1.

The beneficiary of the present agreement is Mr. Luis Bolivar Hernandez Peñaherrera, an Ecuadorian citizen with national identity document No. [XXX].

SIXTH: LEGAL BASIS

Article 1 of the American Convention on Human Rights establishes the following in relation to the obligation to respect rights:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.²⁵

Article 8 of the American Convention on Human Rights, concerning the right to a fair trial, provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."²⁶

Article 13 of the American Convention on Human Rights, concerning freedom of thought and expression, states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. Respect for the rights or reputations of others; or
- b. The protection of national security, public order, or public health or morals.²⁷

Article 24 of the American Convention, concerning equal protection of the law, provides: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."²⁸

Article 25 of the American Convention on Human Rights, on the right to judicial protection, states:

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.

2. The States Parties undertake:

²⁵ OAS, Inter-American human rights system, American Convention on Human Rights, November 22, 1969, Art. 1.

²⁶ Ibid., Art. 8.

²⁷ Ibid., Art. 13 (1) and (2).

²⁸ Ibid., Art. 24.

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.²⁹

Article 48(1) (f) of the American Convention on Human Rights provides: “1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: ... f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”³⁰

Article 37(4) of the Rules of Procedure of the Inter-American Commission on Human Rights provides:

Prior to making its decision on the merits of the case, the Commission shall set a time period for the parties to express whether they have an interest in initiating the friendly settlement procedure provided for in Article 40 of these Rules of Procedure. In the cases provided for in Article 30.7 and in the preceding subparagraph, the Commission shall request the parties to respond in a more expeditious manner. The Commission may also invite the parties to submit additional observations in writing.³¹

Article 40(1) of the Rules of Procedure of the Inter-American Commission on Human Rights provides: “On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter [....].”³²

Article 11 of the Constitution of the Republic of Ecuador states:

The exercise of rights shall be governed by the following principles:

1. Rights can be exercised, promoted and enforced individually or collectively before competent authorities; these authorities shall guarantee their enforcement.
2. All persons are equal and shall enjoy the same rights, duties and opportunities.

No one shall be discriminated against for reasons of ethnicity, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socioeconomic condition, immigration status, sexual orientation, state of health, HIV status, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminution or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.

The State shall adopt affirmative-action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.

3. The rights and guarantees set forth in the Constitution and in international human rights instruments shall be directly and immediately enforced by and before any civil, administrative or judicial public servant, either by virtue of their office or upon request.

²⁹ Ibid., Art. 25.

³⁰ Ibid., Art. 48(1)(f).

³¹ Ibid., Art. 37(4).

³² OAS, Inter-American human rights system, Rules of Procedure of the Inter-American Commission on Human Rights, Art. 40(1).

For the exercise of rights and constitutional guarantees, no conditions or requirements shall be established other than those set forth in the Constitution or by law.

Rights shall be fully justiciable. The absence of a legal norm cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions, or to deny their recognition.

4. No legal norm can limit the content of rights or constitutional guarantees.
5. In terms of rights and constitutional guarantees, public, administrative or judicial servants shall abide by the rule and interpretation that most favor their effective realization.
6. All principles and rights are inalienable, un-renounceable, indivisible, interdependent and of equal importance.
7. Recognition of the rights and guarantees set forth in the Constitution and in international human rights instruments shall not exclude the other rights derived from the dignity of persons, communities, peoples and nations that might be needed for their full realization.
8. The contents of rights shall be developed progressively by means of norms, case law, and public policies. The State shall generate and guarantee the conditions needed for their full recognition and exercise.

Any deed or omission of a regressive nature that diminishes undermines or annuls without justification the exercise of rights shall be deemed unconstitutional.

9. The State's supreme duty consists of respecting and ensuring respect for the rights guaranteed in the Constitution.

The State, its delegates, concession holders and all persons acting in the exercise of public authority, shall be obligated to redress infringements of the rights of individuals for negligence or inadequacies in the provision of public services or for the deeds or omissions of their public officials and employees in the performance of their duties.

The State shall immediately exercise the right to file a claim for restoration against those persons responsible for the damage produced, without prejudice to liability under civil, criminal and administrative proceedings.

The State shall be held liable for arbitrary arrest and detention, miscarriage of justice, unjustified delay or inadequate administration of justice, violation of the right to effective judicial protection, and any violations of the principles and rules of due process of law.³³

The relevant portions of Article 66 of the Constitution of the Republic of Ecuador state:

Art. 66. The following rights of persons are recognized and guaranteed:

[...] 4. The right to formal equality, material equality and nondiscrimination.

[...] 6. The right to voice one's opinion and express one's thinking freely and in all of its forms and manifestations.

³³ Ecuador, Constitution of the Republic of Ecuador, 2008, Official Gazette No. 449 of October 20, 2008, Art. 11.

[...] 23. The right to file individual and collective complaints with authorities and to receive substantiated responses and replies. No petitions can be addressed on behalf of the people.³⁴

Article 160 of the Constitution of the Republic of Ecuador provides:

Persons wishing to have a career in the armed forces or police force shall not be discriminated against for admittance. The law shall stipulate the specific requirements for those cases where special skills, knowledge or capabilities are required.

Members of the Armed Forces and the National Police Force shall be subject to specific laws governing their rights and obligations and subject to their system of advancement and promotions based on merit and gender equity criteria. Their job security and professional development shall be guaranteed.

The members of the Armed Forces and the National Police Force can only be deprived of their ranks, pensions, decorations and commendations for causes set forth in these laws and cannot make use of privileges stemming from their ranks over the rights of persons.³⁵

Article 2348 of the Ecuadorian Civil Code on *Transacción* [settlement of a dispute] provides: [...] *Transacción* is an instrument whereby the parties agree to put an end to a dispute or avoid a potential dispute without referring the matter to judicial proceedings.³⁶

Article 5 of the Organic Law of the Office of the Attorney General of the State provides:

[...] On the exercise of the representation of the State. In exercising the representation of the State, the Attorney General of the State has the power to: [...] f. Authorize the chief officers of public-sector agencies and entities, subject to a report in favor from the respective government attorney or legal counsel, to withdraw or settle the dispute, when the amount in dispute is undetermined or greater than US\$20,000.³⁷

The relevant portions of Article 12 of the Organic Law of the Office of the Attorney General of the State provide:

[...] In relation to public-sector agencies and entities that lack legal personality, the Attorney General of the State has the power to settle or withdraw the dispute in proceedings in which it represents said agencies and entities as plaintiff or respondent, provided that such acts are done to protect the nation's finances and the public interest.³⁸

Article 67 of the Organic Law on Judicial Guarantees and Constitutional Oversight provides:

[...] Object and Scope. The object of repetition is to declare and enforce financial responsibility for fraud or gross fault on the part of public servants in the exercise of their duties, when the State has been ordered to provide material reparation in a judgment or final verdict in a proceeding on constitutional guarantees or in a sentence or final ruling in a proceeding before an international entity for protection of rights.³⁹

³⁴ Ibid., Art. 66 (4), (6) and (23).

³⁵ Ibid., Art. 160.

³⁶ Ecuador, Ecuadorian Civil Code, Official Gazette, Supplement No. 46 of June 24, 2005, Art. 2348.

³⁷ Ecuador, Organic Law of the Office of the Attorney General of the State, Official Gazette 312, April 13, 2004, Art. 5.

³⁸ Ibid., Art. 12.

³⁹ Ecuador, Organic Law on Judicial Guarantees and Constitutional Oversight, Official Gazette, Supplement No. 52 of October 22, 2009, Art. 67.

Article 97 of the Armed Forces Personnel Law concerning promotion concerning grades for promotion provides: "Military personnel who meet the basic requirements for a promotion shall undergo the performance evaluation process at the rank they hold. Personal merits, professional training, and work experience shall be taken into account."⁴⁰

Article 25 of the Armed Forces Personnel Law provides: "Military ranks and grades based on training shall be awarded: 1. To general officers, by executive decree. 2. To senior officers: To colonels and navy captains, lieutenant colonels, navy commanders, majors and navy lieutenant commanders, and junior officers, by ministerial decision. 3. To officer cadets, enlisted personnel, and cadets, by decision of the relevant force general commandant."

SEVENTH: FRIENDLY SETTLEMENT AGREEMENT

Based on the foregoing, the parties hereby agree to the following:

Reparation Measures

Following the negotiation process, as stated in the unnumbered letters to the Ministry of National Defense dated December 11 and 19, 2017, setting out the requests and positions of Luis Bolivar Hernandez Peñaherrera, and the counterproposal enclosed in Official Letter No. MDN-MDN-2018-0531-OF of April 23, 2018, from the Ministry of National Defense to Luis Bolivar Hernandez Peñaherrera, it was agreed that by executive decree, as prescribed in Article 25 of the Armed Forces Personnel Law, the President of the Republic will award Luis Bolivar Hernandez Peñaherrera the rank of brigadier general and in the same act order the military discharge of the beneficiary of this agreement.

Likewise, following the negotiation process, the parties have agreed that the Ecuadorian State, through the institution responsible for the performance of friendly settlement agreements, shall take the necessary steps before the competent agencies, so that, upon his promotion to Brigadier General and discharge, Luis Bolivar Hernandez Peñaherrera may access the social security rights to which is rank entitles him.

EIGHT: WITHDRAWAL, APPROVAL, AND REQUEST TO ARCHIVE THE PROCEEDING BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

It should be mentioned that in a request presented to the Inter-American Commission on Human Rights on September 21, 2018, in an official letter addressed to the inter-American agency, Luis Bolivar Hernandez Peñaherrera communicated his decision to withdraw his petition.

Consequently, the Ecuadorian State and the beneficiary of this agreement undertake to report to the Inter-American Commission on Human Rights on the fulfillment of this agreement. By the same token, this instrument shall immediately be approved by the inter-American agency once it is signed.

In addition, by virtue of the fulfillment of this agreement, the beneficiary undertakes to:

- Request the archiving of the proceeding under way in the inter-American human rights system under Article 42(1) of the Rules of Procedure of the Inter-American Commission on Human Rights, once the friendly settlement agreement has been performed in full.

NINTH: RIGHT OF REPETITION AGAINST THOSE RESPONSIBLE

⁴⁰ Ibid., Art. 97.

The Ecuadorian State, through the Ministry of National Defense in coordination with the Office of the Attorney General, will initiate the necessary actions to exercise the right of repetition against those public servants that engaged the international responsibility of the State in this case, in which the Inter-American Commission on Human Rights, decided in its report on admissibility to declare the petition admissible as to the alleged violations of Articles 8 (right to a fair trial), 13 (freedom of thought and expression), 24 (right to equal protection) 25 (right to judicial protection) of the American Convention on Human Rights to the detriment of Luis Bolivar Hernandez Peñaherrera.

TENTH: TIME LIMIT FOR IMPLEMENTATION OF REPARATION MEASURES

The Ecuadorian State undertakes to fulfill this friendly settlement agreement within one year from the signing of this document.

By virtue thereof, Luis Bolivar Hernandez Peñaherrera may not bring any subsequent claim against the Ecuadorian State for the controversies expressed in this document, whether through judicial or extrajudicial channels.

ELEVENTH: ACCEPTANCE

The parties to this agreement hereby freely and voluntarily state their conformity and satisfaction with the content of the foregoing clauses and expressly place on record that in so doing they put an end to any present or future controversy seeking to hold the Ecuadorian State to liability for the acts that gave rise to this case.

For his part, Luis Bolivar Hernandez Peñaherrera undertakes not to sue the State for the same acts denounced before the Inter-American system through administrative or judicial proceedings or in international proceedings for protection of human rights.

TWELFTH: ENABLING DOCUMENTS

The following enabling documents are enclosed with this agreement:

- Decision No. 002 of September 21, 2018, appointing Dr. Diego Regalado Almeida as Attorney General of the State, subrogate.
- Citizenship card of Luis Bolivar Hernandez Peñaherrera.
- Report on Admissibility No. 53/14, Case No. 12.957,
- Technical Report on the Friendly Settlement Agreement, prepared by the Ministry of National Defense.
- Legal Report on the Friendly Settlement Agreement, prepared by the Ministry of National Defense.

THIRTEENTH: PLACE AND DATE OF SIGNING

At Quito, on the twenty-fourth day of September, 2018, the appearing parties have signed this Friendly Settlement Agreement, in relation to Report on Admissibility No. 53/14, Case No. 12.957 before the Inter-American Commission on Human Rights.

By virtue thereof, this Friendly Settlement Agreement is signed by the Attorney General of the State, subrogate, Dr. Diego Regalado Almeida, and Luis Bolivar Hernandez Peñaherrera.

This Friendly Settlement Agreement is signed in quintuplicate, each copy being equally valid, and shall be distributed as follows: one copy to the beneficiary, Luis Bolivar Hernandez Peñaherrera; one copy to the Office of the Attorney General of the State; one copy to the

Social Security Institute of the Armed Forces; one copy to be filed in the archive of the Ministry of Justice, Human Rights, and Worship; one copy to the Office of the President of the Republic; and one copy to be transmitted to the Inter-American Commission on Human Rights.

IV. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

11. The IACHR reiterates that under Articles 48.1.f. and 49 of the American Convention, this proceeding aims at “reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention”. The agreement to carry out this process is a testimony of the State’s *bona fide* to comply with the objects and purposes of the Convention following the principle of *pacta sunt servanda*, according to which States must comply in good faith with the obligations undertaken in treaties. The Commission also underlines that the friendly settlement procedure contemplated in the Convention allows for the termination of individual cases through a non-contentious manner, which has proven to be an important vehicle in reaching a solution at the initiative of both parties, and has been utilized in cases involving many countries.

12. The Commission has closely followed the negotiations in the present case and highly appreciates the efforts made by both parties in reaching a friendly settlement which is compatible with the object and purpose of the American Convention.

13. The Commission appreciates the acknowledgement of international responsibility by the State of Ecuador, set out in the fourth clause of the friendly settlement agreement and takes note of the commitment undertaken by the State, within the scope of the reparation measures, to grant Mr. Luis Bolivar Hernandez Peñaherrera the title of Brigadier General and, continuous act, to declare the military discharge of the petitioner. With respect to the other component of the reparation measure, the State undertook to carry out the necessary diligences for the petitioner to accede to his social security rights, according to his rank. Said commitments were agreed to be fully implemented within the interregnum of one year from the signature of the friendly settlement agreement, ie. September 24, 2018. The Commission requires the parties to inform it in a timely manner of the effective date when such measures are implemented as well as to submit the relevant copies documenting them. The IACHR further commits to closely follow-up on the implementation of the obligations assumed in the agreement, following the guidelines prescribed in Article 49 of the Convention.

14. The IACHR takes note of the fact that the clauses in the agreement predominantly display a declarative nature, and that the only executable clause is No. 7. The Commission considers that such clause is pending for compliance and will continue to monitor its implementation.

15. The Commission takes into special consideration to issue this report that pursuant to the terms of the friendly settlement agreement, the parties, when signing the agreement, have jointly requested the Commission to publish the report referred to in Article 49 of the American Convention, in order to begin the formalities related to the grant of Mr. Luis Bolivar Hernandez Peñaherrera’s military title and his respective social security entitlements by the State. The homologation request was reiterated by the State on October 10 and by the petitioner on October 29, 2018.

V. CONCLUSIONS

16. The IACHR has closely followed the development of the friendly settlement achieved in this case. From the information above, it is clear that the commitments undertaken in the friendly settlement agreement are pending compliance, so it will continue to monitor the process and urges the State to act as quickly as possible to comply with the reparation measures established in clause 7 of said agreement, and to submit to the Commission as soon as possible a compliance plan including the scheduling of the measures yet to be taken.

17. Based on the foregoing considerations and in accordance with the procedure provided for in Articles 48.1.f and 49 of the American Convention, the Commission wishes to reiterate its profound appreciation for the efforts made by the parties and its satisfaction in achieving a friendly settlement in the present case, based on respect for human rights, and compatible with the object and purpose of the American Convention.

18. In light of the considerations and conclusions set forth in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

1. To approve the terms of the friendly settlement agreement signed by the parties on September 24, 2018.

2. To continue with the supervision of the commitments undertaken in clause 7 of the friendly settlement agreement until their full compliance. To that end, to remind the parties of their commitment to report periodically to the IACHR on compliance with the measures undertaken in the friendly settlement agreement and to present a plan and timetable for the implementation of the agreed measures.

3. Make this report public and include it in its Annual Report to the General Assembly of the OAS. Approved by the Inter-American Commission on Human Rights, on the 21th day of the month of December, 2018.

Approved by the Inter-American Commission Human Rights on the 21th day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.