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REPORT No. 2/19
PETITION 1428-08
REPORT ON INADMISSIBILITY

JOSÉ SALOMÓN LEMUS BERRIOS
HONDURAS

Approved electronically by the Commission on January 3, 2019.

Cite as: IACHR, Report No. 2/19. Petition 1428-08. Inadmissibility. José Salomón Lemus Berrios. Honduras. January 3, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	José Salomón Lemus Berrios and José Antonio Avila
Alleged victim:	José Salomón Lemus Berrios
Respondent State:	Honduras
Rights invoked:	Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 9 (freedom from ex post facto laws), 10 (compensation), 11 (privacy), 17 (rights of the family), 19 (rights of the child), 21 (property), 24 (equal protection), and 25 (judicial protection) in relation to Articles 1 (obligation to respect rights) and 2 (domestic legal effects) of the American Convention on Human Rights; ¹ Articles I (life, liberty, and personal security), II (equality before the law), V (honor, personal reputation, and private and family life), VI (right to a family and to protection thereof), IX (inviolability of the home), XI (right to the preservation of health and to well-being), XII (education), XVI (social security), XVII (recognition of juridical personality and civil rights), XVIII (a fair trial), XXIV (petition); XXV (protection from arbitrary arrest), XXVI (due process of law), and XXVIII (scope of the rights of man) of the American Declaration of the Rights and Duties of Man ² and other treaties ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 8, 2008
Additional information received at the stage of initial review:	June 17, 2009; May 27, 2010; July 19, 2011, and June 6, 2012
Notification of the petition to the State:	May 14, 2014
State's first response:	August 29, 2014 and May 12, 2015
Additional observations from the petitioner:	November 27, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument deposited on September 8, 1977)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible:	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	No
Timeliness of the petition:	Yes

¹ Hereinafter, "the American Convention" or "the Convention."

² Hereinafter, "the American Declaration."

³ Articles 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 17, 23, and 25 of the Universal Declaration of Human Rights; Articles 3, 4, 10, and 11 of the International Covenant on Economic, Social, and Cultural Rights; and Articles 2, 3, 7, 9, 10, 14, 15, 16, and 23 of the International Covenant on Civil and Political Rights.

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners affirm that the State of Honduras is responsible for violating the human rights of police officer José Salomón Lemus Berrios (hereinafter, “Mr. Lemus” “or “the alleged victim”) for having: (i) arrested, charged, and imprisoned him in a traumatic and unjust manner; (ii) removed him from his post in a discriminatory manner and failing to comply with the legal procedure established for said removal; and (iii) denied him compensation for these acts.

2. With regard to the arrest and criminal proceedings, the petitioners indicate that on December 15, 1999, the First Civil Court of the Department of Choluteca (hereinafter, “the Court”) received charges filed by the Office of the Regional Prosecutor against Mr. Lemus for theft, abuse of authority, and breach of duties by a government official against the public administration. On August 21, 2000, the Court issued an arrest warrant for the alleged victim. The petitioners further indicate that the alleged victim, without having been served notice of said warrant, appeared on his own on August 24 of that same year and was arrested. On August 30, 2000, the Court issued a remand order because it found sufficient evidence that an offense had been committed and that the defendant might be criminally liable. On November 8, 2000, the prosecutor issued an indictment for the charges of abuse of authority and breach of duties by a government official.

3. The petitioners maintain that since Mr. Lemus was a police officer, he was entitled to have a defense attorney paid for by the police; this was not done and Mr. Lemus’ family members had to help him in order to hire a private defense attorney. On February 11, 2002, the Court handed down its judgment, acquitting him of all criminal responsibility. On April 11, 2002, the Court ordered the alleged victim’s immediate release after receiving a motion presented by the alleged victim to enforce the judgment inasmuch as the judgment of February 2002 had not been appealed.

4. The petitioners hold that the arrest and criminal proceedings caused Mr. Lemus economic and psychological harm. They indicate that in keeping with the Basic Law of the Federal Police in force at the time of these events the person subject to judicial proceedings was to be suspended from their functions, but was still entitled to be paid his or her wages, which would be discontinued if the person were to be found guilty. They affirm, however, that Mr. Lemus stop receiving his wages when he was arrested. They also indicate that during the 20 months he was deprived of his liberty he was unable to help his wife attend to their daughter, who had been born two days prior to his arrest. This situation also inflicted great suffering on his family. At the same time, the petitioners point out that the deprivation of liberty affected Mr. Lemus’ mental health and as a result of the stigma [associated therewith] he had faced great difficulties in finding another job.

5. With regard to Mr. Lemus’ dismissal, the petitioners hold that on May 22, 2001, Congress issued Legislative Decree 58-2001, authorizing the Secretariat of State at the Office of Security to proceed with the retirement of qualified personnel at certain levels. Said Decree also provided that retired personnel were entitled to severance pay consisting of one month of wages for each year of service they had rendered. They report that pursuant to this Decree, Mr. Lemus’ appointment as an investigative agent of the Bureau of Criminal Investigations of the Security Secretariat was cancelled on July 2001, while he was detained.

6. Following his release, on May 2, 2002, the alleged victim filed an appeal to nullify the cancellation of his appointment with the Secretariat of State. The appeal was denied and ruled inadmissible on July 18, 2002, pursuant to Resolution SEDS-SG-054-02. Said Resolution provided that the cancellation was based on Decree 58-2001, which had the status of a law since it had been issued by the Honduran Congress. Subsequently, the alleged victim was called upon to appear at the Office of Human Resources to receive the corresponding severance, but in keeping with the information provided by the State and the records of the case file, he did not appear at said Office.

7. On October 3, 2002, Mr. Lemus filed an action in Administrative Court to nullify the administrative acts contained in the cancellation of his appointment and in Resolution SEDS-SG-054-02. In this action, he held that his removal from his post had occurred in violation of the constitution and domestic

law inasmuch as his right to defense and due process of law had not been ensured. He further held that his deprivation of liberty had been illegal and had harmed his psychological health and his honor. Due to the foregoing, he requested he be compensated.

8. On April 24, 2006, the Administrative Court ruled the action inadmissible. After an appeal was filed, the Administrative Court of Appeals (hereinafter, the Court of Appeals), ruled the absolute nullity of the judgment issued by the Administrative Court as it found that the judgment was inconsistent with the plaintiff's claim. On February 20, 2007, the Administrative Court issued a new judgment ruling the action to be inadmissible due to formal defects. In this regard, it found that the plaintiff sought to have the cancellation agreement nullified, he need not exhaust administrative remedies inasmuch as said type of action is filed without any prior appeal for reversal; nevertheless, the plaintiff had filed for administrative remedies and at the same time had requested payment of damages for having been deprived of his liberty in proceedings in which he had been found innocent. The foregoing entailed two different actions: on the one hand, Mr. Lemus sought the nullity of the cancellation agreement and the resulting reinstatement and payment of back wages; on the other hand, he sought the nullity of the Resolution that denied him, *inter alia*, payment of damages. When the Administrative Court requested that Mr. Lemus clarify the object of his action, he indicated that it was an ordinary claim for damages, but he reaffirmed what he had expressed in his original statement of claim, which gave rise to grounds for the action's inadmissibility.

9. The petitioner filed a new appeal, which was ruled on by the Court of Appeals on June 29, 2007. On that occasion, the Court of Appeals decided that the judgment issued by the Administrative Court was to be partially amended, granting the petitioner the benefits provided for under Legislative Decree 58-2001 (severance for termination), but leaving the rest of the judgment unchanged. The petitioner filed a cassation appeal with the Administrative Labor Division of the Supreme Court of Justice (hereinafter, "the Supreme Court") claiming: (i) harm stemming from deprivation of liberty; (ii) failure to comply with legal procedures; and (iii) moral and economic damages, injury to his honor and life plan due to his deprivation of liberty and removal from his post. On May 14, 2008, the Supreme Court decided not to admit the appeal after finding that the grounds put forward for cassation were unclear and vague.

10. For its part, the State rejects Mr. Lemus' arguments. As for the criminal proceedings, the State holds that the alleged victim did not request that the police pay a professional to represent him during the proceedings and he opted to hire his own private defense attorney. The State further holds that the alleged victim has not provided arguments about harm resulting from his deprivation of liberty; rather, he only points out the damages he claims to have suffered due to his arrest. The State notes that Mr. Lemus did not challenge the arrest itself, but only requested that the pre-trial detention order be overturned on November 20, 2000, and then requested the order for remand be amended on November 30, 2000. The information provided by the State indicates that both requests were ruled inadmissible. Mr. Lemus did not challenge the denial of the first request, and although he did challenge the denial of his second request through the appeal of December 11, 2000, he abandoned this appeal on January 3, 2001.

11. As for the claim for nullification and damages, the State maintains that the cancellation of the alleged victim's appointment was based on Decree 58-2001 issued by the National Congress, which consequently has the status of a law. The State highlighted that Mr. Lemus was entitled as from that point to receive the severance provided for under the Decree, but he never made a claim nor did he initiate civil proceedings to request severance. Instead, Mr. Lemus filed a series of appeals in order to have administrative acts nullified, which were denied by different judicial bodies. The State also mentions that Mr. Lemus was paid his wages up until the time he was terminated.

12. The State underscored that the alleged victim had not exhausted domestic remedies inasmuch as he brought a claim before the administrative courts when he should have done so before ordinary civil courts. The State further underscored that Mr. Lemus has missed the procedural deadlines provided for in the proceedings that he has brought.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. The Commission notes that the alleged victim filed an action for nullity with the Secretariat of State of the Office of Security, and subsequently, an action for nullity with the administrative courts. In such actions he indicated that: (i) his arrest and deprivation of liberty were unjust and illegal; (ii) his right to defense was violated because he was denied a police attorney; (iii) due process was violated when he was removed from his post; and (iv) these acts had caused him economic and moral damages, as well as injury to his honor and life plan, which should be compensated.

14. The Secretariat of State, pursuant to Resolution 54-2002, ruled that the claim was inadmissible, highlighting that: (i) the alleged victim had not requested he be represented by a police attorney and opted to hire his own private defense attorney; thus, the Secretariat was not liable for the costs incurred for his private attorney; (ii) the Secretariat had paid the alleged victim's wages from the time of his arrest until the cancellation of his appointment, and payment of wages for the period subsequent to his dismissal from the police was inappropriate; (iii) the cancellation of his appointment was due to the implementation of Decree 58-2001 and not as a result of the criminal proceedings he was subject to; and (iv) the Secretariat was unable to respond to the alleged harm Mr. Lemus was caused by a measure restricting his liberty, which was taken under criminal proceedings to which the Secretariat was not a party. Nevertheless, the Secretariat acknowledged that the alleged victim was entitled to the payment of severance provided for under Decree 58-2001.

15. The information provided does not show that Mr. Lemus requested representation by a police attorney during the criminal proceedings, nor does it show that following the Secretariat of State's decision he brought legal action against the authorities who were responsible for his arrest and deprivation of liberty, and consequently, for the compensation that he seeks. Likewise, the information does not show that the alleged victim challenged his arrest. In this regard, the Commission takes note that, although the petitioner requested two times that the measure restricting his liberty be lifted, he never went forward and exhausted these proceedings given that the first time he did not appeal the decision denying his request and the second time he abandoned the appeal he had filed.

16. Furthermore, the Administrative Court decided that the action filed to nullify the agreement providing for the cancellation of Mr. Lemus' appointment as well as the Secretariat of State's Resolution 54-2002 on the first action for nullity was inadmissible due to formal defects. The Court noted that Mr. Lemus pursued two different aims, which could not be addressed in the same proceedings (nullity of the cancellation agreement, his reinstatement, and payment of back wages, and nullity of the Resolution that denied him payment of damages). When the Court asked Mr. Lemus to clarify his aim, he indicated that it was an ordinary claim for damages; however, he reaffirmed what he had expressed in his original claim for the nullity action, which was decisive in ruling the action inadmissible. Given this denial, Mr. Lemus appealed and the Court decided unanimously to uphold the judgment and only grant the severance provided for under Decree 58-2001. The alleged victim filed a cassation appeal that was denied because it did not state what the alleged violations consisted of, demonstrate the laws that were violated, or provide the legal basis for the appeal.

17. The Commission finds that the alleged victim has not exhausted domestic remedies in order to raise the alleged violations of his human rights referred to in his petition. There is no evidence that the alleged victim requested he be represented by a police attorney or that he exhausted in a timely fashion domestic remedies questioning the legality of his arrest. Furthermore, with respect to the compensation requested for the damages that he allegedly suffered for the deprivation of his liberty, the IACHR notes that: (i) in the first action for nullity it was ruled that it was improper to request said compensation from a body that had not been responsible for his deprivation of liberty; (ii) the second action for nullity, in which he also requested compensation for the same reasons, was ruled inadmissible due to formal defects, after being given the opportunity to cure those defects; and (iii) there is no evidence that the alleged victim has filed another action that is correctly drafted in civil or administrative courts to request the aforementioned compensation. Furthermore, the other violations alleged in this action for nullity were not analyzed due to formal defects. Therefore, the IACHR finds that the present petition does not meet the requirements of Article 46(1)(a) of the

American Convention and that it is not necessary to undertake an analysis on the plausible nature of potential violations of rights invoked by the alleged victim.

VII. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 3rd day of the month of January, 2019. (Signed): Margarete 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.