

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 14/03; Petition 185/2002
Session:	Hundred and Seventeenth Regular Session (17 February – 7 March 2003)
Title/Style of Cause:	Roger Herminio Salas Gamboa v. Peru
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Julio Prado Vallejo and Clare K. Roberts. In accordance with the provisions of Article 17(2)(a) of the Regulations of the Commission, Commission member Susana Villaran, a national of Peru, did not participate in the discussion or in the decision adopted in this case.
Dated:	20 February 2003
Citation:	Salas Gamboa v. Peru, Petition 185/2002, Inter-Am. C.H.R., Report No. 14/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
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## I. SUMMARY

1. In the petition presented to the Inter-American Commission on Human Rights (hereinafter “the Commission”) on March 11, 2002, Mr. Roger Herminio Salas Gamboa (hereinafter “the petitioner”), alleged that the Republic of Peru (hereinafter “Peru”, “the State” or “the Peruvian State”) violated his right to a fair trial, right to protection of his honor, his political rights, right to equality before the law and right to judicial protection, all of which are recognized in Articles 8, 11, 23, 24 and 25, respectively, of the American Convention on Human Rights (hereinafter “the Convention” or the “American Convention”), in accordance with Article 1(1) of the abovementioned international instrument. The violations alleged are related to irregularities alleged to have been committed by the National Council of the Magistracy in its decision not to ratify his appointment as a full judge of the Supreme Court of Justice of the Republic.

2. With regard to the admissibility of the petition, the petitioner argues before the Commission that, according to Article 142 of the Constitution of 1993 and consistent with Article 1 of Act N° 26397 of the Organic Law of the National Council of the Magistracy, the decisions of the National Council of the Magistracy are not subject to review by a judicial body and therefore that no domestic remedy remains to be exhausted. The exception provided for in Article 46(2)(a) and (b) of the Convention is therefore applicable and the petition was lodged within the period allowed, having regard to the date of notification.

3. For its part, the State contends that there has been no violation whatsoever of the Convention, since the process of ratification of the appointment of officials of the judicial branch is carried out in accordance with the provisions of the Constitution. That proceeding is different from the disciplinary proceedings which the same organization is authorized to undertake with a view to dismissing the same officials.

4. After reviewing the arguments of the parties and the question of whether the requirements for admissibility provided for in the Convention were fulfilled, the Commission decided to declare the petition admissible, in accordance with the provisions of Articles 46 and 47 of the American Convention. The Commission also decides to notify the parties of this decision, to publish it and to include it in its annual report to the General Assembly of the OAS.

## II. PROCESSING BY THE COMMISSION

5. On April 4, 2002, the Commission received the complaint filed by Mr. Roger Herminio Salas Gamboa and assigned it N° 0185/2002. On September 18, 2002, it transmitted the pertinent parts of the complaint to the State of Peru and requested the State to provide information on the matter within a period of 60 days. On October 15, 2002, the State requested an extension of the time allowed for replying, and the State granted the extension in its note of October 23, 2002, which was transmitted to the State on October 26, 2002. The State submitted its reply on November 26, 2002. On January 6, 2003, the petitioner submitted additional information regarding the complaint and requested a hearing at the Commission's 117th session, which was held from February 17 to March 7, 2003. That request was denied.

6. The Commission considers that the pertinent information is now available and that it is therefore in a position to rule on the admissibility of the petition.

## III. POSITIONS OF THE PARTIES

### A. The petitioner

7. The petitioner alleges that, based on the results of a public competitive examination, he was appointed a member of the Supreme Court of Justice of Peru in Supreme Decision N° 105-90-JUS of May 25, 1990. His appointment was confirmed in Senate Decision N° 1093-90, published on September 21, 1990, and the title of Judge conferred on him on September 19, 1990. He was sworn in to the post on September 27, 1990. All of these acts took place while the Constitution of 1990 was still in force. That Constitution did not provide for the periodic reconfirmation of judges in their posts and guaranteed continuation in service up to the age of 60 years, provided that the incumbent was of good conduct and remained suitable for the post.

8. He alleged that, in those circumstances, he was assigned to the Second Criminal Chamber of the Supreme Court of Justice of the Republic and, as the least senior member of the Court, he was required under the organic law governing the judicial branch to assume the functions of Examining Magistrate of the Supreme Court with responsibility for criminal proceedings against senior officials of the nation. Among others, he was assigned the case brought by the Senate of the Republic against Dr. Alan García Pérez, former President of Peru, on which he ruled on

December 2, 1991 that there were no grounds for prosecution, a decision that was confirmed by the higher instances and in respect of which the Inter-American Commission on Human Rights also pronounced in Case 11.006 Peru Alan García, with the final report N° 1250 being adopted on February 7, 1995.[FN2]

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[FN2] The report referred to by the petitioner is report N° 1/95, Case 11.006 Alan García Pérez, of February 7, 1995.

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9. He further alleged that, following the accession to office of the Government of Emergency and National Reconstruction, headed by Mr. Alberto Fujimori Fujimori, on April 5, 1992, himself and twelve other judges of the Supreme Constitutional Court were dismissed by Decree Law N° 25423, published in the Diario Oficial El Peruano on April 8, 1992, without any statement of cause being given. As a result of this action, he filed for protection and the Constitutional Court finally ruled on September 27, 1997 that he should be reinstated as a full judge of the Supreme Court of Justice of the Republic and that the period during which he did not serve by reason of his suspension without cause should be recognized for pension purposes.

10. He claims that, notwithstanding the aforementioned decision of the Constitutional Court, the Government of President Fujimori promulgated a series of decree laws and acts designed to avoid compliance but that he was finally reinstated on May 14, 2001 together with other judges who also had not served on the bench during the period between January 1994 and December 2000. Upon resumption of his judicial activities, it fell to him by reason of his seniority to head the Provisional Criminal Chamber of the Supreme Court of Justice of the Republic.

11. He alleged that the process of reconfirmation based on Article 150 of the Constitution of 1993 and on Article 1 of Act N° 26934 is the responsibility of the National Council of the Magistracy, which performs this function as the sole authority and whose decisions are not subject to review by any other judicial body.[FN3] The National Council of the Magistracy reviews every seven years the performance and abilities of judges and prosecutors at all levels through an evaluation of their conduct and suitability for the performance of their duties, taking into consideration the completed workloads of their courts, the merits and reports of the Colleges and Associations of Attorneys, and the results of an obligatory personal interview with the judge under evaluation. Should a decision be taken to remove him from his post, this “does not constitute a penalty nor does it deprive him of the rights acquired under the law, although it does prevent him from returning to the judicial branch or to the Department of Public Prosecution”. [FN4]

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[FN3] Political Constitution, Article 150. The National Council of the Magistracy is responsible for the selection and appointment of judges and prosecutors, except where the latter are chosen by popular election. The National Council of the Magistracy is independent and is governed by its Organic Law (Article 142). Decisions of the National Electoral Board on election-related matters and decisions of the National Council of the Magistracy on matters concerning the evaluation and reconfirmation of judges are not subject to review by a judicial forum. Act N°

26.397, Article 2: - the National Council of the Magistracy shall have competence in matters concerning the selection, appointment, reconfirmation and dismissal of judges and prosecutors at all levels, except where the latter are chosen by popular election, in which case it shall be empowered only to confer the title and to impose the penalty of dismissal, where appropriate under the law. Decisions on the matters referred to in the above paragraph shall not be subject to review by a judicial body. Its decisions may not be challenged.

[FN4] Ibid, Act N° 26.397, Articles 29 and 30.

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12. He alleged that he had reached the fifth phase of the reconfirmation process, which began on June 19, 2001, having been interviewed by five of the seven members of the Council to whom he explained his situation, especially the fact that during the seven-year period after which the law required that he be re-evaluated, he had not exercised his judicial functions on the bench, since he had been removed from his post, as a result of which he was unable to show any results of his judicial activities. The said interview was completed in thirty minutes and, while it was supposed to have been videotaped, only one and half minutes (1"30) of the interview was actually recorded. "The recording of the interview is not complete, since the cassette ran out, as was noted when the next interview began". He explained that the decision not to reconfirm him in his post was taken by the seven judges of the National Council of the Magistracy, two of whom could not have had sufficient information upon which to base their decision, since they had not been present at the interview and did not have a complete recording of the aforementioned interview.

13. He based his complaint on the fact that the decisions of the National Council of the Magistracy are arbitrary. They are not based on legal grounds, nor are the judges being evaluated informed of the factors that were taken into account in reaching the decision. There is no possibility of appealing the decisions or of any judicial review. The decision makes it impossible thereafter to be reinstated as a member of the Court and, in his specific case, he had been evaluated under equal conditions with other judges without having completed seven years on the bench, precisely because he had been unjustly removed from his post by the State since 1992 and reinstated after May 2001, following the ruling of the Constitutional Court.

#### B. The State

14. For its part, the State maintained that, since the petitioner had not been reconfirmed in his post by the National Council of the Magistracy, none of his rights had been violated, since the process of evaluation and reconfirmation had been conducted in accordance with the provisions of Article 154(2) of the Constitution and that such decisions are not subject to review by a judicial forum.

15. It stated further that decisions on the reconfirmation of judges in their posts constitute an exercise of the discretionary authority conferred on the National Council of the Magistracy by the Constitution and the Organic Law and that there is no requirement to state the grounds on which decisions are based, since it is not a disciplinary action that is comparable to a judicial proceeding in which the guarantees enshrined in Article 139 (5) of the Constitution of Peru and

Article 8(1) of the American Convention must be respected. Likewise, the process of reconfirmation does not constitute a disciplinary action.

16. The petitioner was subject to an evaluation process for his reconfirmation in the post under the same rules as applied to the other judges and the results were different, since they were individual proceedings designed to evaluate conduct and suitability in a report on the final decision. The right to equality was therefore not violated.

#### IV. ANALYSIS

##### A. Competence of the Commission

17. The petitioner is entitled under Article 44 of the American Convention to lodge a complaint with the IACHR. The petition identifies as the alleged victim an individual, in respect of whom Peru has undertaken to respect and guarantee the rights enshrined in the American Convention. With respect to the State, the Commission notes that Peru has been a party to the American Convention since September 5, 1984, the date on which it deposited the corresponding instrument of ratification. The Commission is therefore competent *ratione personae* to consider the petition.

18. The Commission is competent *ratione loci* to hear the petition, insofar as it alleges violations of rights protected in the American Convention that are alleged to have taken place within the territory of a State party to the Convention. The IACHR is also competent *ratione temporis*, insofar as the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at the date on which the acts referred to in the petition are alleged to have occurred. Lastly, the Commission is competent *ratione materiae*, since the petition denounces violations of human rights protected by the American Convention.

##### B. Other requirements for admissibility

###### a. Exhaustion of domestic remedies

19. With regard to this requirement for admissibility, the Commission notes that in the processing of the case, at no time did the State assert the objection of non-exhaustion of domestic remedies with respect to the domestic proceedings instituted against Mr. Roger Herminio Salas Gamboa.

20. The petitioner alleged, moreover, that the exception provided for in Article 46(2)(a) of the Convention was applicable to his case insofar as no other remedy is available under the domestic legislation of Peru to appeal the decision of the National Council of the Magistracy and that the State had accepted this in its response.

21. It is for the IACHR to determine whether the State had tacitly renounced its right to assert the objection.

22. The Inter-American Court of Human Rights has stated that “the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.”[FN5] In the present case, the IACHR therefore determines that the Peruvian State has not asserted the objection in question in any of its communications to the Commission, having tacitly renounced its use insofar as it did not assert the objection expressly and in a timely manner. The Commission therefore considers that the requirement provided for in Article 46(1)(a) has been met under the exception contained in Article 46(2)(a) of the American Convention.

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[FN5] IACtHR, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88, Case of Godínez Cruz, Preliminary Objections, Judgment of June 26, 1987. Series C N° 3, para. 90; Case of Fairén Garbí and Solís Corrales, Preliminary Objections, Judgment of June 26, 1987. Series C N° 2, para. 87; Case of Loayza Tamayo, Preliminary Objections, Judgment of January 31, 1996. Series C N° 25, para. 40.

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b. Time allowed for presentation of the petition

23. In the petition under consideration, the IACHR has concluded that the State of Peru has tacitly renounced its right to assert the objection of failure to exhaust domestic remedies.

24. However, the requirements under the Convention for the exhaustion of domestic remedies and for the presentation within six months from the date of notification of the final judgment under domestic law are independent of each other. The Inter-American Commission must therefore determine whether the petition was presented within a reasonable period of time. The Commission notes that the decision of the National Council of the Magistrature that is being challenged was handed down on September 18, 2001 and communicated to the petitioner the following day, that is to say, September 19, 2001. Since that decision is not subject to review by a judicial body, as the State acknowledged in its written reply, it is from that date that the six-month period within which the petitioner is required to lodge his complaint to the IACHR begins to run. This was effectively done, since the Commission received the petition of Mr. Roger Herminio Salas Gamboa on March 11, 2001.

c. Duplication of proceedings and res judicata

25. There is no evidence that the matter that is the subject of this petition is pending in any other international proceeding for settlement or that it substantially duplicates a previous case that has already been considered by the Commission or by any other supranational organization.

d. Characterization of the acts

26. The Commission considers that the statement of the petitioner is not manifestly groundless or obviously out of order, since it concerns acts that the petitioner alleges are violations of Articles 8, 24 and 25, respectively, of the American Convention, in accordance with Article 1(1) of the Convention, as the petitioner indicated in paragraph 13 above, and it is

therefore proper to admit the petition in question, in accordance with the provisions of Article 47(b) and (c) of the Convention.

27. Likewise, the Commission considers that the petitioner did not specify or allege the violation related to Article 23 of the Convention and that there would not be sufficient arguments either in reference to the violation of Article 11 of the Convention, as a result of which it would not be proper to admit these violations because there are no facts in the relevant parts of the petition to characterize it as such.

## V. CONCLUSIONS

28. Based on the arguments of fact and of law set out above and without prejudice to the substance of the question,

The Inter-American COMMISSION ON Human Rights,

DECIDES:

1. To declare admissible the petition presented by Mr. Roger Herminio Salas Gamboa concerning the alleged violation of Articles 1(1), 8, 24 and 25, respectively, of the American Convention, by the State of Peru.
2. To notify the parties of this decision.
3. To continue its consideration of the substance of the matter.
4. To place itself at the disposal of the parties with a view to reaching a friendly settlement based on respect for the rights recognized in the American Convention and to invite the parties to take a decision with respect to that course of action.
5. To publish this decision and to include it in its annual report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C, on February 20, 2003. Signed by Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; and Commission members: Robert K. Goldman, Julio Prado Vallejo and Clare K. Roberts.