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File Number(s):	Report No. 70/04; Petition 667/01
Session:	Hundred Twenty-First Regular Session (11 – 29 October 2004)
Title/Style of Cause:	Jesus Manuel Naranjo Cardenas, Lilian Esther Jimenez, Subdelia Mirabal, Lourdes M. Fernandez, Tatiana Pokorovsky de Orarzabal, Amelia Margarita Rojas, Ana C. Perez de Carmona, Sonia M. Ponte Borjas, Jacinto Carvajal, Fernando Viventini, Ignacio Alexandre, Timoteo Jimenez; Daniel Pinero, Jose Caro, Raul Rodriguez, Oscar Schemel and Tulio Pachano v. Venezuela
Doc. Type:	Decision
Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Florentin Melendez. Commissioner Freddy Gutierrez, a Venezuelan national, did not participate in the deliberations and the voting on this report, pursuant to Article 17(2)(a) of the Commission’s Rules of Procedure.
Dated:	15 October 2004
Citation:	Naranjo Cardenas v. Venezuela, Petition 667/01, Inter-Am. C.H.R., Report No. 70/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by:	APPLICANTS: the Venezuelan Program for Education and Action in Human Rights and the National Association of Retired Workers and Pensioners of the Venezuelan International Aviation Corporation and the Center for Justice and International Law
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## I. SUMMARY

1. On September 21, 2001, the Inter-American Commission on Human Rights (hereinafter “the Commission” or the “IACHR”) received a petition lodged by the Venezuelan Program for Education and Action in Human Rights [Programa Venezolano de Educación Acción en Derechos Humanos] (PROVEA) and the National Association of Retired Workers and Pensioners of the Venezuelan International Aviation Corporation [Asociación Nacional de Trabajadores Jubilados y Pensionados de Venezolana Internacional de Aviación Sociedad Anónima] (ANTJUVIASA) (hereinafter referred to as “the alleged victims”), in which they alleged that the Bolivarian Republic of Venezuela (hereinafter “the State” or “the Venezuelan State”) has incurred responsibility for failure to comply with judicial rulings issued by domestic courts to protect the right of the alleged victims to social security.

2. The petitioners alleged that the State was responsible for violating the rights to judicial protection, private property, and the progressive development of social security of 17 retired

former workers of the company, as established in Articles 21, 25, and 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention,” and Articles XVI and XVIII of the American Declaration of the Rights and Duties of Man (“Declaration” or the “American Declaration”), to the detriment of the victims and their next of kin, in addition to a breach of its general obligation to respect and guarantee the rights protected in Article 1(1) of the Convention.

3. The alleged victims contended that they had exhausted the domestic remedies established in Venezuelan legislation by filing an amparo petition which was decided in their favor by the Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area and upheld by the Third Superior Court for Labor Matters of the Judicial District of the Caracas Metropolitan Area.

4. In response, the Venezuelan State argued that the alleged victims had the opportunity to bring legal action in Venezuelan courts and obtained judicial rulings in their favor. However, they did not bring action to enforce the judgment in their favor, which means that they failed to exhaust domestic remedies and that therefore the petition is inadmissible, pursuant to the provisions of Article 46.1(a) of the American Convention.

5. After examining the positions of the parties, the Commission concluded that it was competent to decide on the complaint filed by the alleged victims, and that the case was admissible, in view of Articles 46 and 47 of the American Convention. Consequently, the Commission decided to notify the parties and publish the present report on admissibility and include it in its annual report.

## II. PROCEDURES OF THE COMMISSION

6. On September 21, 2001, the Commission received a petition lodged by the Venezuelan Program for Education and Action in Human Rights (PROVEA) and the National Association of Retired Workers and Pensioners of the Venezuelan International Aviation Corporation (ANTJUVIASA) against the Bolivarian Republic of Venezuela.

7. The Commission recorded the petition as Number 667/2001 and on February 26, 2002, it requested information from the State, pursuant to the provisions of Article 30(3) of its Rules of Procedure. On March 11, 2002, the Commission addressed a letter to the Permanent Representative of the Bolivarian Republic of Venezuela to the Organization of American States, explaining that the period of two months to submit observations on the petition would begin as of the date of that communication.

8. On October 18, 2002, the State of Venezuela submitted to the Commission a report and response regarding the matters of admissibility and the merits of the complaint, and requested that it declare the petition inadmissible. On October 24, 2002, the Commission forwarded this response to the alleged victims, and gave them a period of 30 days to submit the relevant comments.

9. On November 25, 2002, the alleged victims requested a 60-day extension to present their observations on the State's response. On November 26, the Commission granted the extension requested for a period of 60 days.
10. On January 27, 2003, the alleged victims presented to the Commission their observations on the State's response. In a letter dated March 21, 2003, the Commission acknowledged receipt of that communication. On the same day, the Commission forwarded the observations of the alleged victims to the State.
11. On December 10, 2003, the Venezuelan Program for Education and Action in Human Rights (PROVEA), the National Association of Retired Workers and Pensioners of the Venezuelan International Aviation Corporation, and the Center for Justice and International Law (CEJIL), acting as co-petitioners, submitted a brief to the Commission in which they reported the death of one of the victims, and requested application of Article 37(3) of the Commission's Rules of Procedure.
12. On December 15, 2003, the Commission forwarded to the State the communication of the alleged victims and requested a decision of the request of the petitioners regarding application of Article 37(3) of the Rules of Procedure.
13. On March 3, 2004, during the 119th session of the IACHR, a working meeting was held to discuss the positions of the parties and to explore the possibility of a friendly settlement in the case. On that date, the State presented to the Commission a brief in which it confirmed in its totality the contents of the report dated October 8, 2002 and attached a copy of the judgment of the Venezuelan Supreme Court of Justice in which it declared the appeal filed by VIASA with the Supreme Court to be without merit.
14. On March 9, 2004, the alleged victims submitted the death certificate of Jesús Manuel Naranjo, who was an alleged victim in the petition and whose death had been reported to the Commission in a brief dated December 10, 2003. On March 25, 2004, the Commission acknowledged receipt of the communication and transmitted the information to the State.
15. On April 12, 2004, the alleged victims presented to the Commission their observations on the information provided by the State on March 3, 2004, at a working meeting on the case.
16. On May 10, 2004, the State addressed a communication to the IACHR requesting a list of the alleged victims and a report on the total amount of the alleged debt.
17. On June 15, 2004, the alleged victims presented observations on the communication by the State dated May 10, 2004. In their observations, the alleged victims requested the Commission to grant a 30-day extension to provide the information requested by the State.
18. On June 21, 2004, the IACHR acknowledged receipt of the communication from the alleged victims and transmitted the information to the State, giving it a period of one month to present its observations.

19. On August 24, 2004, the Commission received a brief from the petitioners in which they responded to the information requested by the State in its letter of May 10, 2004. This was transmitted to the State on September 14, 2004.

20. On September 9, 2004, the State requested an extension to present observations. On September 14, the Commission decided to grant the State a 20-day extension. The Commission had not yet received a response from the State to date.

### III. POSITIONS OF THE PARTIES

#### A. Position of the petitioners

21. According to the petition, the Bolivarian Republic of Venezuela violated the rights to social security, to property, and to judicial protection enshrined in the American Convention on Human Rights and in the American Declaration on the Rights and Duties of Man, to the detriment of the following retired workers of the Venezuelan International Aviation Corporation (hereinafter “VIASA” or “the company”): Lilian Esther Jiménez, Subdelia Mirabal, Lourdes M. Fernández, Tatiana Pokorovsky de Orarzabal, Amelia Margarita Rojas, Ana C. Pérez de Carmona, Sonia M. Ponte Borjas, Jesús Manuel Naranjo Cárdenas, Jacinto Carvajal, Fernando Viventini, Ignacio Alexandre, Timoteo Jiménez; and, the deceased Daniel Piñero, represented by his widow, Yolanda Muro de Piñedo, José Caro, represented by his widow, Remedios Faraig de Caro, Raúl Rodríguez, represented by his widow, Nelly Cuevas de Rodríguez, Oscar Schemel, represented by his widow, María Chruszcz Schemel, and Tulio Pachano, represented by his niece, Dulce Consuelo Pachano (hereinafter referred to as “the pensioners” or “the retired workers”).

22. The petitioners argue that the state-owned company VIASA was partially privatized in 1992. Through that privatization, the Spanish aviation company “Iberia” acquired 45% of the shares, the Provincial Bank of Venezuela acquired 15%, and the Venezuelan State, through the Venezuelan Investment Fund, retained 40% of the company’s stock.

23. The petitioners assert that in the stock transaction, the State agreed with the buyers that all the workers would lose their status as government employees, and that they would therefore also lose the benefits of the Retirement Plan established for them. This clause was agreed to despite the fact that under domestic legislation, labor rights are considered as irrevocable.

24. When the company was privatized, the alleged victims continued to be dependent on VIASA. That company paid its pension obligation up to 1997, when it unilaterally stopped payment of these benefits.

25. The petition alleges that on September 3, 1998, the company, as part of the judicial proceeding on delinquent debts [proceso de atraso],[FN2] required the 17 workers to sign an agreement in which they waived their right to retirement. This agreement was ratified judicially by the Bankruptcy Court, in a proceeding that declared the judicial bankruptcy of VIASA.

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[FN2] Article 898 of the Venezuelan Commercial Code establishes that: Businesses whose assets are greater than their liabilities and which, because of a cash deficit due to unforeseen events or any other type of excusable cause, find that they need to delay or defer payments, shall be considered in default and may request the competent Commercial Court to authorize them to proceed with the friendly settlement or liquidation of their operations, within a period of time not to exceed twelve months. They shall pledge not to engage in any operations other than simple retail transactions until their request is settled.

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26. On April 27, 1999, the retired workers filed a petition for amparo, in which they alleged violations of their rights to work, of irrevocable labor rights, and of social security. This petition was heard by the Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area.

27. On May 20, 1999, the Seventh Court declared that the amparo petition had merit, and that the agreement signed between the company and the retired workers was null and void, on the grounds of unconstitutionality. As a result, the Seventh Court ordered “the reinstatement of the right of the retired workers to enjoy the full benefit of their retirement pensions.”[FN3] According to the Court, this reinstatement made “the complainants creditors of the payment of a single sum of money that should cover the amount owed on retirement pensions from September 3, 1998 until such time as the petitioners reach an average age of seventy (70) years, taking into account the present age of each of them, at the rate of the minimum wage in force for the month of September 1998.”[FN4]

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[FN3] Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area, judgment of May 20, 1999, operative paragraph 1.

[FN4] Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area, judgment of May 20, 1999, operative paragraph 2.

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28. On the obligatory nature of the amparo judgment, the Court ruled that “the bankruptcy judge should take into account the privileged nature of these debts,” and that “the bankruptcy judge, the labor unions, the Creditors Committee, and the joint administrators were required to comply with this decision within ninety (90) calendar days, counting from the date of publication and recording of said decision, and warned that any failure to comply with this term would be considered as contempt of court.”[FN5]

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[FN5] Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area, judgment of May 20, 1999, operative paragraphs 3 and 4.

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29. The decision was appealed by the company and the Venezuelan Investment Fund. The court with jurisdiction to hear the appeal was the Third Superior Court for Labor Matters of the Judicial District of the Caracas Metropolitan Area. This Court upheld the decision of the Seventh Court, in a judgment issued August 13, 1999. Its ruling confirmed the decision of the Seventh

Court in full, except for the phrase “until they reach an average age of seventy (70) years,” which was revoked “taking into account that retirement pension is an income for life [...] hence such a benefit cannot be limited in time.”[FN6] The petitioners allege that this ruling had the effect of improving the protection granted and increasing the monetary benefits paid to the retired workers.

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[FN6] Third Superior Court for Labor Matters of the Judicial District of the Caracas Metropolitan Area, judgment of August 13, 1999, preamble 2.

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30. On February 10, 2000, the Venezuelan Investment Fund filed an amparo petition against the judgment of the Third Superior Court for Labor Matters. On May 23, 2000 the Constitutional Chamber of the Supreme Court of Justice declared that the petition for amparo was without merit.[FN7] The Constitutional Chamber argued in its decision that:

In the present case, the amparo petition was already the subject of two legal actions, so that a new amparo petition cannot be filed--just as is the case with rulings—against this last decision, unless it pertains to the violation of a constitutional guarantee or right different from the one that gave rise to the amparo petition on which there is a firm, final judgment. Even though the brief accompanying the petition reports violations of the rights to defense and due process, the premises supporting the arguments of the moving party and the specific allegations regarding the case are such that this Chamber concludes that in actual fact, the intention is to reopen the original debate, which would in all events constitute a third legal process, and not examination of a new violation.[FN8]

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[FN7] Supreme Court of Justice, Constitutional Chamber, judgment of May 23, 2000, M.P.: José M. Delgado Ocando.

[FN8] Supreme Court of Justice, Constitutional Chamber, judgment of May 23, 2000, M.P.: José M. Delgado Ocando.

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31. The petitioners allege that by virtue of these judgments, both the Venezuelan International Aviation Company and the Venezuelan Investment Fund (which was converted into the Economic and Social Development Bank in May 2001) were required to comply with restitution of pensions. They further regard the constitutional organs of the State in charge of guaranteeing enforcement of court rulings as responsible for execution of the judgments.

32. The petitioners argue that the judicial amparo decisions fully exhausted available domestic remedies. This was the view of both the Venezuelan Public Defenders’ Office [Defensoría del Pueblo de Venezuela] and the Supreme Court of Justice. On this point, the Public Defenders’ Office intervened in the bankruptcy proceedings and admonished the judge that he should comply with the amparo decision, in the following terms:

"[...] On the one hand, the Organic Labor Law has precedence over the Code of Commerce, and on the other, the fact that the case in point involves labor liabilities, special consideration should be applied to ensure the most beneficial result for the working class. Therefore, in response to the question put earlier, it is our opinion that in view of the constitutional protection obtained through the amparo proceeding and upheld by the high court, in view of the fact that the amparo proceeding that the representatives of the former Venezuelan Investment Fund, now the Development Bank, endeavored to have heard by the Constitutional Chamber was declared INADMISSIBLE, and, in view of the very special nature of labor rights, the creditor rights acquired by the retired persons and pensioners should be considered as analogous to the creditor rights of the bankrupt's estate, even if they occurred prior to the judgment declaring bankruptcy.

For these reasons, the fate of these financial claims should not be equal to the rest, and they should be treated with special consideration as part of the bankrupt's estate, so that payment of these debts may take place during the bankruptcy process, thereby guaranteeing their constitutional rights."[FN9]

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[FN9] Public Defenders' Office, General Directorate of Legal Services, Department of Judicial Remedies, Communication sent to the Trial Judge for Civil, Commercial, and Traffic Matters of the Caracas Metropolitan Area, November 11, 2002, preambular 2.

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33. The petitioners maintain that to date, after more than five years have gone by since the amparo ruling was pronounced; the court's decisions have not been complied with. The petitioners allege that noncompliance with the judicial orders entails the continued and present violation of the labor rights of the retired workers. This situation has resulted in a total lack of protection for the pensioners, who are of advanced ages and are subject to the many physical ailments of the elderly. The living conditions of these persons are highly precarious, since in most cases, they do not have the economic means to provide for their basic needs, which causes their health to deteriorate even further. While waiting for compliance with the court's judgment, six of the retirees have died.[FN10]

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[FN10] Daniel Alberto Piñero, deceased on September 11, 1996, Oscar Schemel, deceased on April 27, 1999, José Caro, deceased on November 26, 1999, Raúl Rodríguez, deceased on May 27, 2000, Tulio Pachano, deceased on October 24, 2000, Jesús Manuel Naranjo Cardenas, deceased on March 14, 2003, and José Caro, for whom the precise date of death is unknown.

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34. The petitioners consider that the facts described constitute violations of their rights, as established in Articles 1, 21, 25, and 26 of the American Convention on Human Rights, and a violation of Articles XVI (right to social security) and XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man. They further consider that their petition meets the requirements for admissibility established in Article 46 of the American Convention, including exhaustion of domestic remedies which they regard as exhausted by the amparo rulings

of the Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area and the Third Superior Court for Labor Matters of the Judicial District of the Caracas Metropolitan Area.

B. Position of the State

35. The State does not dispute the truth of the facts presented by the petitioners. According to the State, the facts are an indication that the petitioners had an opportunity to seek remedies under Venezuelan law and obtained judicial rulings in their favor.

36. For the State, the circumstances of the case “completely follow normal judicial procedure”[FN11] since the Venezuelan courts ruled in favor of the petitioners and ordered reinstatement of the infringed legal situation. The State argues, however, that the petitioners have not initiated enforcement of the judgment in their favor with the competent judges, and that this implies that domestic remedies were not exhausted and therefore the petition is inadmissible. The petitioners, on the other hand, contend that enforcement or execution of judgment was not a suitable remedy.

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[FN11] Ministry of Foreign Affairs, State Agent for Human Rights with the Inter-American and International System, Report-Response of October 18, 2002, p. 8.

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37. The State argues that in accordance with Venezuelan procedural practices, execution of a judgment is not a judicial order that is officially issued, but that it is the obligation of the plaintiff or the person bringing legal action.[FN12] The petitioners in the VIASA case did not bring action on this matter in the Venezuelan courts.

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[FN12] Article 524 of the Code of Civil Procedure establishes that:  
When the judgment is a firm, final judgment, the court, at the request of the interested party, shall issue a decree ordering execution. In that decree, the court shall establish a time period of no less than three day or more than ten for the debtor to voluntarily comply, and it may not begin enforcement or obligatory execution until that period of time has completely lapsed without voluntary compliance with the judgment.

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38. The State further maintains that the amparo order given to the bankruptcy judge, which gave him 90 days to settle the matter, could not be executed from a legal standpoint “without violating the human rights of all the company’s debtors,”[FN13] who are currently involved in a bankruptcy process that has its own procedural principles based on Venezuelan commercial law. It is therefore necessary to wait until the company is liquidated without “subverting the legal order through a group’s pressures that could result in a breach of constitutional rights of one of the creditors of the VIASA company who are also parties, privileged or not, to the bankruptcy procedure.”[FN14]

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[FN13] Ministry of Foreign Affairs, State Agent for Human Rights with the Inter-American and International System, Report-Response of October 18, 2002, p. 16.

[FN14] Ministry of Foreign Affairs, State Agent for Human Rights with the Inter-American and International System, Report-Response of October 18, 2002, p. 22.

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39. The State declared that in the event of noncompliance with judicial rulings, the persons denied justice may have access to criminal courts to denounce the authorities that are failing to comply. In the present case, the complaints filed by the petitioners with the Ministerio Publico and with Government officials pertaining to the judicial contempt produced an effect, without violating the rights of the petitioners in the VIASA case in the proceedings in which they participated as complainants. For instance, one of the judges who heard the bankruptcy case and failed to comply with the amparo order was removed from office, while another judicial official is being investigated.

40. The State alleged that the Venezuelan Judiciary at all times acted to provide legally well-founded and timely responses in an attempt to protect the interests of the petitioners. The case was even referred to the highest court of justice in Venezuela, by a petition for transfer to a higher court filed by the Procuraduría General de la República with the Political and Administrative Chamber of the Supreme Court of Justice. This petition was denied by the Supreme Court, on the grounds that the transfer could harm fundamental rights.[FN15]

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[FN15] Supreme Court of Justice, Political and Administrative Chamber, judgment of December 11, 2001.

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41. The State concludes that the pensioners were not denied their right to social benefits or their legal status as privileged creditors of the company. At the present time, in view of the judicial declaration of bankruptcy of VIASA in the procedure on its delinquent debts, a court proceeding is taking place with declaration of judicial possession of the assets, which must be processed in accordance with Venezuelan commercial procedure.

#### IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY

A. Commission's jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*

42. Pursuant to Article 44 of the American Convention, petitioners are entitled to lodge petitions containing denunciations or complaints with the IACHR. The petition indicated that there were 17 individuals who were alleged victims (see paragraph 9 above), persons for whom Venezuela was obligated to respect and guarantee the rights established in the American Convention. As for the State, the Commission points out that Venezuela has been a party to the American Convention since August 9, 1977, the date on which it deposited its instrument of ratification. The Commission therefore has personal jurisdiction to examine the petition.

43. The Commission has jurisdiction *ratione loci* to hear the petition, since it alleges violations of rights protected in the American Convention that would have taken place within the territory of a state party to that treaty. Moreover, the IACHR has jurisdiction *ratione temporis*, because the obligation to respect and guarantee the rights protected in the American Convention was already in force for the State on the date the acts alleged in the petition took place.

44. As for subject matter jurisdiction, the Commission notes that the petitioners maintained that the State violated the rights to property (Article 21), to effective remedies (Article 25(2)(c), and progressive development of economic, social, and cultural rights (Article 26), and the duties of States to respect the rights (Article 1(1)) established in the Convention, in addition to the right to social security (Article XVI) and the right to a fair trial (Article XVIII) established in the Declaration.

45. The Commission reiterates in this regard that once the Convention entered into force in the State, that it and not the Declaration became the primary source of law applicable by the Commission, whenever the petition refers to an alleged violation of the same rights in both instruments and does not involve a situation of continuous violation.[FN16] In the present case, there is a similarity between the provisions of the Declaration and the Convention invoked by the petitioners. Thus, the right to a fair trial (Article XVIII) established in the Declaration is subsumed in the provision that provides for the right protected in Article 25 of the Convention. Consequently, the Commission will only refer to the provisions of the Convention in relation to these violations of the Declaration.

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[FN16] IACHR, Report N° 03/01 (Admissibility), Case 11,670, Amilcar Menéndez, Juan Manuel Caride et al. (Welfare system) v. Argentina, January 19, 2001, para. 41 ff.

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46. Article 26 of the American Convention contemplate in a generic way to the protection of the economic social and cultural rights. The American Declaration in its Article XVI establishes in a specific way the right to the social security. The petitioners invoked the violation so much of the Article 26 of the Convention as the violation of the Article XVI of the Declaration. In the present case, the Commission considers that that has competence *ratione materiae* regarding the alleged violations to the guarantee of the right to social security by virtue of Article 26 of the American Convention.

## B. Requirements for admissibility

### 1. Exhaustion of domestic remedies

47. On exhaustion of domestic remedies, the petitioners argued that they had initiated amparo proceedings, as established in Venezuelan legislation, to demand the enjoyment and exercise of constitutional rights and guarantees.[FN17] This petition was decided in favor of the alleged victims by the Seventh Trial Court for Labor Matters of the Caracas Metropolitan Area. The respondent company and the Venezuelan Investment Fund availed themselves of the opportunity to appeal the decision. The Third Superior Court for Labor Matters of the Judicial District of the

Metropolitan Area of Caracas had jurisdiction to decide on the appeal. This Court confirmed the sentence of the lower court, exhausting the possibilities to appeal the court's decision. The petitioners allege that this decision is self-executing, and that therefore the complainants did not have any obligation to bring further action or file another appeal to request enforcement of the judgment. However, in view of the nonexecution of the judgment, the petitioners initiated criminal proceedings of contempt of court to investigate the responsibility of the judicial officials who refused to comply with the orders of the amparo judges.

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[FN17] Article 1 of the Organic on Protection of Constitutional Rights and Guarantees establishes:

Any natural person residing in the Republic, or any legal person domiciled in it may request that the competent courts provide the protection [amparo] stipulated in Article 49 of the Constitution for the enjoyment and exercise of constitutional rights and guarantees, and even those fundamental rights of human beings that are not expressly established in the Constitution, for the purpose of immediately reinstating the violated legal situation or the situation most similar to it. The guarantee of personal freedom regulated by constitutional habeas corpus will be governed by this Law.”

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48. During the procedures of the Commission, the alleged victims also argued that the State admitted the unjustified judicial delay of more than three years in the case. This situation would exempt the petitioners from the requirement of exhaustion of domestic remedies pursuant to Article 31 of the Commission's Rules of Procedure.[FN18]

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[FN18] Response of the petitioners to the State's observations received by the IACHR on January 28, 2003, p. 7.

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49. The State alleged the existence of an additional judicial remedy that was not pursued by the petitioners and requests that the case be found inadmissible. According to the State's arguments, the petitioners should have brought action for execution of the judgment on amparo.[FN19] The State further contends that with the judicial declaration of the bankruptcy of VIASA, payment of the claims of retired workers is currently being discussed in a complex bankruptcy process in which the rights of all creditors are being debated. Consequently, the State argues that it cannot force a “hasty ruling in favor of some creditors (the petitioners), [since] this could harm their own rights regarding the amount of money to be received, as well as those of other creditors, whether privileged or not.”[FN20]

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[FN19] The procedure of execution or enforcement of judicial sentences is regulated by Chapter II of Title IV of the Venezuelan Code of Civil Procedure.

[FN20] Ministry of Foreign Affairs, State Agent for Human Rights in the Inter-American and International System, Report-Response of October 18, 2002, p. 23.

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50. Article 46 of the American Convention establishes that in order for a case to be admitted, “the remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law.” This requirement was established to ensure that the State could settle disputes within its own legal system. On this point, the Commission has reiterated that the State that argues an exception to failure to exhaust domestic remedies has the burden of proving that there are still domestic remedies to be exhausted and that these remedies are adequate and effective.[FN21]

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[FN21] IACHR, Report N° 60/03 (Admissibility), petition 12,108, Marcel Claude Reyes et al. v. Chile, October 10, 2003, Para. 51; IACHR, 2000 Annual Report, Report N° 02/01, Case 11.280, Juan Carlos Bayarri, Argentina, January 19, 2001, para. 30.

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51. In this analysis, it is relevant to clarify what are the domestic remedies that must be exhausted in each specific case. The Inter-American Court of Human Rights has found that only adequate remedies to rectify the violations alleged to have been committed need be exhausted. The expression “adequate remedies” means that:

the function of these remedies within the system of domestic law would be suitable or sufficient for protection of the violated legal situation. In all national legal systems, there are many remedies, but not all are applicable in all circumstances. If, in a specific case, the remedy is not suitable, it is obvious that it does not have to be exhausted. This is reflected in the principle that the legal provision is meant to produce an effect and cannot be interpreted in the sense that it does not produce any effect or that its result would be clearly unreasonable or absurd.[FN22]

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[FN22] Inter-American Court, Velásquez Rodríguez Case, judgment of July 29, 1988. Series C No. 4, para. 63.

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52. The Commission has also argued that the requirement of exhaustion of domestic remedies does not mean that the alleged victims have the obligation to exhaust all the remedies available to them. Both the Court and the Commission have maintained on repeated occasions that “(...) the rule that requires the prior exhaustion of domestic remedies is conceived in the interest of the State, since it seeks to absolve it of the need to respond to an international organ for acts imputed to it before having had an opportunity to remedy them using its own means.”[FN23] Consequently, if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.[FN24]

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[FN23] Inter-American Court, Matter of Viviana Gallardo et al. Series A N° G 101/81, para. 26.

[FN24] IACHR, Report N° 57/03 (Admissibility), petition 12.337, Marcela Andrea Valdés Díaz v. Chile, 10 October 2003, para. 40.

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53. The IACHR would emphasize that to determine the admissibility of a petition, it must be decided whether the petitioners exhausted adequate remedies to resolve the principal situation denounced. In other words, the Commission must decide what the adequate and effective recourse would be to remedy the principal situation described in the complaint.[FN25] In the case in point, the State argues that the petitioners, as recipients of judicial protection and privileged creditors of the bankruptcy procedure of VIASA, needed to exhaust a remedy of execution or enforcement of the judgment. However, the IACHR confirms that the adequate and effective remedy for protection of the petitioners' pension rights under Venezuelan procedural law is an amparo petition, as established by the Organic Law on Protection of Constitutional Rights and Guarantees.[FN26]

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[FN25] IACHR, Report N° 57/03 (Inadmissibility), petition 12.303, Mariblanca Staff Wilson and Oscar E. Ceville R. v. Panama, October 22, 2003, para. 42.

[FN26] Published in Official Gazette N° 34.060 dated September 27, 1988.

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54. The Commission finds that an action for amparo was brought by the petitioners, and was litigated in two instances in the competent courts. Exhaustion of the action is confirmed in the decision of the Constitutional Chamber of the Supreme Court of Justice, which denied an amparo petition filed by the Venezuelan Investment Fund against the judgment of the higher court that upheld amparo action for the retired workers.[FN27]

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[FN27] Supreme Court of Justice, Constitutional Chamber, judgment of May 23, 2000, M.P.: José M. Delgado Ocando.

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55. The self-executing nature of orders issued in amparo decisions has been confirmed in Venezuelan constitutional jurisprudence. The Constitutional Chamber of the Supreme Court of Justice issued the following opinion:

The Organic Law of Protection [Amparo] for Constitutional Rights and Guarantees does not specifically refer to the executing phase of an amparo decision. However, the reinstatement of a legal situation declared in an amparo decision may be accompanied by orders to be executed to achieve that reinstatement. In this sense, paragraph b) of Article 32 eiusdem is clear: "...Precise determination of the order to be carried out, with the necessary specifications for its execution," while Article 30 eiusdem establishes "the immediate and unconditional execution of the unfulfilled act." The Chamber is of the view that it would be poorly serving the cause of effective justice if amparo judgments could not be executed or enforced, since this is the only sanction in the event of noncompliance, criminal proceedings for contempt [...] When a company is ordered to re-employ a worker, the judge cannot physically force the responsible

party to do so, and in those cases, once failure to comply has been verified, the case files are sent to the Ministerio Público, because the amparo was ineffective due to the refusal to comply on the part of the party who was meant to execute it. All of these alternatives arise from the result of execution of the amparo if it were possible.[FN28]

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[FN28] Supreme Court of Justice, Constitutional Chamber, judgment of October 2, 2002.  
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56. Consequently, the Commission concludes that the petitioners in the present case exhausted the adequate and effective remedies within their reach to reverse the violated legal situation, thereby fulfilling the requirements established in Article 46.1(a) of the American Convention and Article 31 of the Commission's Rules of Procedure.

## 2. Timeliness of the petition

57. With regard to the requirement established in Article 46(1)(b) of the Convention, pursuant to which the petition is to be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment, the Commission confirms its position as follows:

Failure to comply with a final judgment is a continuous violation by States and a continued infringement of Article 25 of the Convention, which establishes the right to effective judicial protection. Therefore, in such cases the requirement pertaining to the term for lodging petitions stipulated in Article 46(1)(b) of the American Convention does not apply.[FN29]

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[FN29] IACHR, Report N° 89/99 (Admissibility), Case 12,034, Carlos Torres Benvenuto et al. v. Peru, paras. 22 and 23; IACHR, Report N° 75/99 (Admissibility), Case 11,800, Cabrejos Bernuy v Peru, para. 22.  
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58. Consequently, the requirement pertaining to the term for lodging petitions established in Article 46(1)(b) of the American Convention is not applicable in the present case, in which, based on the information submitted to the IACHR, there is a continuous violation of the decisions issued by the Venezuelan courts in relation to the amparo petition filed by the retired workers of VIASA, which was not in any way reproached by the Venezuelan State. The Commission is of the opinion that the petition was presented within a reasonable period of time.

## 3. Duplication of procedures and res judicata

59. The files in this case do not contain any information that could lead one to determine that this matter is pending in another international procedure or that it was previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided for in Article 46(1)(d) and in Article 47(d) of the American Convention are not applicable.

4. Characterization of the alleged facts

60. Article 47(b) of the Convention establishes that the Commission shall declare inadmissible any petition or communication submitted if it “does not state facts that tend to establish a violation of the rights guaranteed by this Convention.” The Commission considers that the facts alleged by the petitions described in Section III of this report could characterize violations of Articles 1, 21 and 25, of the American Convention.

61. Likewise, the Commission finds that the facts invoked by the presumed victims prima facie might characterize the nonperformance of the obligations of the State in relation with Article 26 of the American Convention which establishes the obligation of the States to develop progressively the full effectiveness of the rights that stem from the economic and social policies as well as education, science and culture rights contained in the Charter of the Organization of American States. To this respect, without prejudging on the merits of the matter, the Commission finds that the nonperformance of the judicial judgment dictated in the internal order guaranteeing the right to social security, alleged by the presumed victims as entitlement, might characterize a violation of the Article 26 of the American Convention.

62. In consequence, the IACHR concludes that at this stage the case is admissible in accordance with Article 47(b).

V. CONCLUSIONS

63. The Commission concludes that the case is admissible and that it has jurisdiction to examine the complaint filed by the petitioners regarding the alleged violation of Articles 21, 25, and 26, taken together with Article 1(1) of the Convention pursuant to the requirements established in Articles 46 and 47 of the American Convention.

64. On the grounds of these arguments of fact and of law, and without prejudice to the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare admissible the case under examination, in relation to Articles 1(1), 21, 25, and 26 of the American.
2. To notify the State and the petitioners of this decision.
3. To initiate procedures on the merits of the case.
4. To publish this decision and include it in the Annual Report, to be presented to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 15th day of October, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Paulo Sérgio Pinheiro and Florentín Meléndez, Commissioners.

REASONED VOTE BY CLARE K. ROBERTS, COMMISSIONER FIRST VICE –  
PRESIDENT, IACHR

I share the decision of admissibility in the present report with the exception of the inclusion of Article 26 of the American Convention.

In my opinion the facts do not establish a prima facie case of the violation of Article 26. My position is reinforced by the fact that in the “Five Pensioners’ Case (Inter Am Ct Hr (No 98 of 2003) – the request to rule on the progressive development of economic, social and cultural rights in Peru on facts similar to the facts of this case was denied by the Inter-American Court. In that case the court held at paragraph 147 –

Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights[FN30] had already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners who dose not necessarily represent the prevailing situation.

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[FN30] U.N. Doc. E/1991/23, United Nations, Committee on the Economic, Social and Cultural Rights General Observation N° 3: (Parr. 1, Article 2 of the Pact), adopted on its Fifth Period of Sessions, 1990, item 9.  
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It seems to me therefore that in the present case the Commission should not add violation of Article 26 of the Convention as a ground for admitting it, especially as admissibility is already well founded on Articles 21 and 25.

Clare K. Roberts

First Vice –President, IACHR