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Title/Style of Cause: Ricardo Urbano Poma v. Peru
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Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez.
Dated: 4 March 2008
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I. SUMMARY

1. On October 6, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR") received a petition from Ricardo Urbano Poma (hereinafter "the petitioner" or "the alleged victim") lodged on his own behalf against the Republic of Peru (hereinafter "Peru," "the Peruvian State," or "State"), alleging that his employment with the Peruvian Institute of Social Security (IPSS) had been arbitrarily terminated as part of an administrative streamlining process. As a result, according to the petitioner's account, he instituted proceedings for reinstatement with the Constitutional Court, which found in his favor. However, the Court refrained from ordering the IPSS to pay the remunerations he had not received for the period when the allegedly arbitrary termination order was in effect.

2. The petitioner alleges that, by these acts, the State violated his rights enshrined in Article 8 (right to a fair trial), Article 24 (right to equal protection), and Article 25, (right to judicial protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in conjunction with its general obligation to respect and guarantee rights and freedoms under Article 1(1) thereof. With regard to fulfillment of the requirements of admissibility, the petitioner states that remedies under domestic law had been exhausted by obtaining final judgment from the Constitutional Court, of which he was notified on July 24, 1999; that he made his denunciation within a period of six months of said judgment; and that he fulfilled the other requirements established by the American Convention and the Rules of Procedure of the Commission (hereinafter "Rules of Procedure").

3. The State, for its part, requested that the Commission declare the petition inadmissible under Articles 47(a) and 47(b) of the American Convention, since it did not contain facts tending

to establish a violation of the rights protected by the Convention. The State alleges that the petitioner had confined himself to requesting the Commission to act as a “fourth instance” of the Peruvian courts by overturning a judgment issued by a competent Peruvian court acting in accordance with its view of the jurisprudence and the legislation in force. The State also alleges that the petition should be declared inadmissible because remedies under domestic law were not exhausted.

4. In this report, the Commission examines the available information in light of the provisions of the American Convention and concludes that the petition does not meet the requirement set forth in Article 46(1)(a) of the American Convention. Therefore, based on Article 47(a) of the American Convention, the IACHR decides to declare the petition inadmissible, to forward the report to both parties, to publish it, and to order its publication in the Annual Report.

II. PROCESSING BY THE COMMISSION

5. On October 6, 1999, the Commission received a petition lodged by Ricardo Urbano Poma. On November 4, 1999, the IACHR notified the petitioner that, in order to process the petition, it required specific information regarding fulfillment of the requirements set forth in Article 47(b). On February 4, 11, and 29, 2000, the petitioner provided additional information regarding the subject of his complaint. On December 13, 2002, the IACHR forwarded the relevant parts of the petition to the State, setting a period of two months for it to provide such observations as it considered pertinent. On February 24, 2003, the State requested additional time to submit its reply. On March 5, 2003, the IACHR granted the extension requested, allowing the State an additional month.

6. On April 21, 2003, the State submitted its observations on the petition, which were forwarded by the IACHR to the petitioner on April 22, 2003. On May 7, 2003, the State submitted additional observations, which were forwarded to the petitioners in a communication dated May 22, 2003. On August 15, 2003, the petitioner submitted additional observations, which were forwarded to the State in a communication dated October 8, 2003. On May 31, 2006, the Commission received additional observations from the State. On July 6, 2006, the IACHR forwarded the information sent by the State to the petitioners, requesting that they submit their observations within 30 days.

III. POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioner states that he was an employee of the Peruvian Institute of Social Security (IPSS). He alleges that on April 13, 1993, his employment was arbitrarily and unlawfully terminated when an IPSS staff streamlining process was implemented. The petitioner states that on July 23, 1992, the Peruvian government, by Decree Law No. 25636, authorized the Peruvian Institute of Social Security to carry out a streamlining process for administrative staff only, but not for general services personnel.

8. According to the petitioner's account, the staff streamlining process took place in two stages. The petitioner indicates that in the first stage, which he was not involved in, a retirement program offering financial incentives was implemented, in which workers were offered a specific number of salaries and payments for years worked in exchange for their resignation from the IPSS. He states that the second stage involved an evaluation and selection process, which culminated in an examination administered to workers on November 15, 1992. In that regard, the petitioner alleges that the IPSS at no time notified him that he was required to undergo said examination. Nonetheless, his employment was terminated on April 13, 1993, along with that of approximately 20,000 other workers. The petitioner concludes by stating that his employment was terminated despite the fact that he was not an administrative staff member, but rather in the services department, and without having been notified in person and in writing that he was required to take a competitive examination assessing performance on November 15, 1992.

9. According to the petitioner, once he had exhausted administrative remedies and his dismissal had been upheld by a ruling on November 18, 1996, on February 18, 1997, he brought an action for amparo, in which he requested that the court order the company to reinstate him in his former position and to pay all remunerations he had not received, beginning from the date of his dismissal and ending on the date his reinstatement was ordered. On January 14, 1999, the Constitutional Court issued a judgment, of which the petitioner was notified on July 24, 1999, ordering his reinstatement. However, it refrained from ordering payment of remunerations not received. The petitioner alleges that the Court denied his claim, arguing that he had not performed any service during the time following the termination of his employment.

10. The petitioner states that this decision is manifestly unlawful and illegitimate, as under the doctrine of Peruvian labor law, if the termination is characterized as unlawful and abusive, as occurred in his case, and the period of time spent unemployed has been imputed to the party responsible for the arbitrary act, it satisfies the definition of an irregular suspension from work that generates a right to payment of all remunerations not received. The petitioner notes that the payment of these types of remunerations "has undergone incredible and absurd metamorphosis in recent years since the establishment of the Constitutional Court."

11. Thus, according to the petitioner, up until the creation of the Constitutional Court, the Constitutional and Social Chamber of the Supreme Court always ordered, where the violation of a worker's constitutional rights had been established, his or her reinstatement, plus payment of all remunerations due from the termination of the employment until his or her effective reinstatement. Since the creation of the Constitutional Court, but before "its members were 'crippled,'" reinstatement was ordered, but not payment of remunerations, leaving intact the right of the worker to assert his claim through adversarial administrative proceedings, as amparo is allegedly an expedited proceeding that does not include a stage for the production of evidence. Since the " 'crippling' of the Constitutional Court," the right of a worker to payment of his outstanding remunerations has been denied on the grounds that it is inappropriate to pay remunerations owed since no effective service of any kind had been performed by the worker during the period.

12. The petitioner alleges that, by refusing to pay his overdue remunerations, the State violated his rights to due process and judicial protection. The petitioner also claims that the

variations in the jurisprudence of the Court violated his right to equal treatment under the law, as different treatment has been accorded in similar circumstances. Claims for the payment of overdue remunerations made by other individuals in his same position have been favorably decided, constituting discriminatory treatment, to the detriment of the petitioner. Based on the foregoing, the petitioner requests the IACHR to “set aside the judgment rendered by the Constitutional Court of the Republic of Peru in favor of the Peruvian Institute of Social Security where it states [...] that it is inappropriate for him to receive remunerations accrued during the period of his termination.”

13. With regard to fulfillment of admissibility requirements, the petitioner claims that the remedies under domestic law were exhausted with obtainment of a judgment from the Constitutional Court, of which he was notified on July 24, 1999; that he lodged his petition within six months of the date of said judgment; and that he met the other formal requirements established by the American Convention and the Rules of Procedure.

B. The State

14. The State alleges that, in the instant case, the Constitutional Court decided the matter before it in accordance with the legislation in force. According to the State, the Constitutional Court’s decision to refrain from ordering payment of the owed remunerations was based on the findings of case law prior and subsequent to the resolution of the case before it of Mr. Urbano Poma. Its view was that the remuneration should be treated as consideration for work performed in the context of a labor relationship and that it should not be considered in relation to an action for amparo, since the purpose of amparo actions is to restore pre-violation conditions. Payment of owed remunerations, however, would by nature be compensatory rather than restorative.

15. In relation to this argument, the State annexed a series of decisions of the Constitutional Court in this area, emphasizing in particular the following doctrine:

The view of the Constitutional Court regarding a claim for remuneration not received during the period in which work was not performed as a result of cessation or termination originally was to disallow said claim, since it took the view that remuneration was consideration for work effectively performed. This view has recently changed, since now the right is left intact of the appellant to request, in the corresponding form and via the corresponding procedural path, compensation for damage caused by the unjust termination of employment, since it considers that such a claim is compensatory, rather than restorative in nature [See submission No. 456-2003-SR/TC, of April 9, 2003].

16. Therefore, in the instant case, the State maintains that the Peruvian legislation in force at the time was consistently applied. In the view of the State, the mere fact that the case was not decided in a manner favorable to the petitioner’s interests does not per se mean that Article 8 of the Convention was violated since, as the Commission has indicated, a negative result in a fair trial does not in and of itself constitute a violation of the Convention.

17. Furthermore, the State alleges that the petitioner failed to fulfill the requirement of exhaustion of domestic remedies since, as indicated by the Constitutional Court, the petitioner

preferred not to avail himself of his right to seek compensation for damage and injury via the procedure provided for in Article 1969 of the Civil Code, which governs jurisdictional procedure. By means of said remedy, the petitioner could have sought compensation for damages incurred as a result of the wrongful termination of his employment.

18. The State indicates that the petitioner did not invoke the aforementioned remedy, allowing the corresponding time limit (two years) to expire. Accordingly, the petitioner is not in a position to request the IACHR to order payment of his remuneration when effective remedy was available to him that would have enabled him to settle his claim via domestic remedies, which were not invoked for reasons that did not involve the responsibility of the State.

19. With regard to the alleged violation of Article 24 of the Convention, the State argues that the petitioner did not duly establish any facts tending to constitute a violation of the rights guaranteed by the Convention. Regarding this, the State alleges that, in accordance with Peruvian law and jurisprudence, the legal consequences of voided termination and collective termination are different. According to the State, the petitioner cannot argue that the termination was void, since the facts in his case do not constitute one of the grounds for voiding of termination established by Legislative Decree No. 728. Accordingly, there was no discrimination whatsoever in the non-application of said Legislative Decree No. 728 in the petitioner's case, since it was he himself who had recourse to actions for due process – governed by Law No. 23506, in force at the time – as this was a more appropriate judicial remedy for requesting non-imposition of the decisions that led to his termination. For these reasons, the State considers that the petitioner did not state facts tending to establish a violation of Article 24 of the Convention.

20. Based on the foregoing, the State argues that the facts set out in the petition do not tend to establish violations of the rights guaranteed by the American Convention, therefore constituting grounds for inadmissibility under Article 47(b) of the Convention. Additionally, the State argues that the petition should be declared inadmissible as the requirement of exhaustion of domestic remedies set forth in Article 46(1)(a) of the Convention was not met.

IV. ADMISSIBILITY

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

21. Under Article 44 of the American Convention, the petitioner has the right to lodge petitions with the Commission. The petition names as the alleged victim Ricardo Urbano Poma, for whom the Peruvian State was obliged to respect and guarantee the rights enshrined in the American Convention. Peru has been a State Party to the American Convention since July 28, 1978, the date on which it deposited of its instrument of ratification. Therefore, the Commission has competence *ratione personae* to consider the petition.

22. The Commission also has competence *ratione loci* to consider the petition inasmuch as it contains alleged violations of rights protected by the American Convention, said to have occurred within the territory of a State party. The Commission has competence *ratione temporis*

to consider the petition, inasmuch as the obligation to respect and guarantee the rights protected by the Convention was already binding upon the State at the time the facts alleged in the petition were said to have occurred. Lastly, the Commission has competence *ratione materiae* in this matter since as the petition reports possible violations of human rights protected by the American Convention.

B. Exhaustion of remedies under domestic law

23. Article 46(1)(a) of the Convention provides that in order for a petition or communication filed with the Inter-American Commission under Article 44 of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement ensures every state party the opportunity to settle human rights cases within its own system of justice before the case is taken up by an international body. The prior exhaustion requirement applies when the domestic system affords remedies that are adequate and effective to remedy the violation being alleged. In this sense, Article 46(2) specifies that the requirement shall not be applicable when (a) the domestic legislation of the state concerned does not afford due process for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

24. With regard to fulfillment of the requirement regarding prior exhaustion of domestic remedies set forth in Article 46(1)(a) of the American Convention, the petitioner alleges that an action for amparo was the appropriate remedy in connection with violation of his constitutional rights, under the provisions of Law No. 23506. The petitioner states that he instituted and exhausted an amparo action, for which final judgment was issued by the Constitutional Court on January 14, 1999. The judgment therein found in favor of the plaintiff regarding his claim for reinstatement in his employment, but refrained from ordering payment of salaries not received during the period when the measure violating Mr. Urbano Poma's rights was effective. According to the petitioner, this was the appropriate mechanism to pursue for cessation of the violations of this rights and effective reparation thereof. Accordingly, having obtained a judgment from the highest Constitutional Court in Peru denying his claim, there was no remaining remedy he could seek to recover his remunerations.

25. For its part, the State argues that the petitioner did not exhaust all domestic remedies. The State argues that the action for amparo is conceived in Peru as an action for constitutional guarantees the objective of which, by means of a simple and short procedure, is protection of the fundamental rights of the individual. As alleged by the State, the purpose of the amparo action is "to restore the situation prior to the violation or threat of violation of a constitutional right." Thus, amparo actions follow their own expedited procedure, whose essential aim is to restore violated rights or prevent their violation. In the instant case, the State alleges that amparo was the appropriate procedural path for reversal of the violation of the constitutional right, i.e., non-imposition of the decrees that ordered termination of the petitioner's employment, but was not appropriate to pursue payment of remunerations not received. For this objective, the applicant should have instituted proceedings for compensation wherein the judicial authority could order a

phase for the presentation of evidence, which could be examined and a judgment issued in accordance with the law. Thus, the State alleges that, under Article 1969 of the Civil Code, such a claim should be pursued through proceedings governed by Articles 475 to 478 of the Civil Procedural Code.

26. The Commission considers it necessary to make a preliminary determination of the subject of the international proceeding for settlement to determine whether domestic remedies were exhausted in connection with this complaint. To that end, the Commission notes that the main claim of the petitioner refers to lack of payment of remunerations not received as a result of the termination of his employment.

27. In that context, the Commission emphasizes that, with regard to assignment of the burden of proof in determining whether the requirement of exhaustion of domestic resources was met, when the State alleges that it was not, it is incumbent upon it to indicate the remedies that had to be exhausted and their effectiveness. If the State alleging failure to exhaust domestic remedies establishes the existence of specific recourses that should have been pursued, it will be incumbent upon the petitioners to demonstrate that said resources were exhausted or constitute any of the exceptions set forth in Article 46(2) of the Convention.

28. In the instant case, the Commission considers that the petitioner, in the processing before the IACHR, did not demonstrate why he considered the remedies described by the State to be inappropriate or ineffective. He also failed to argue for the applicability of any of the exceptions to the exhaustion of domestic remedies set forth in Article 46(2)(a) and (b).

29. Additionally, the Commission notes that the Constitutional Court established that in the instant case, an action for amparo was not the appropriate remedy for the pursuit of certain claims. In that regard, the Commission reiterates that it is not incumbent upon it to analyze the alleged international responsibility of the Peruvian State based on the Constitutional Court's interpretation of the domestic law applicable to the appropriateness of the amparo remedy. In fact, the Commission notes that the matters raised by the petitioner would require the IACHR to review the interpretation of the procedural laws applicable in this case in order to determine the appropriateness of the procedural path chosen by the petitioner to satisfy his claims.[FN1]

[FN1] IACHR, Report N° 68/07 (Inadmissibility), Petition 37-98, Carlos Agripino Huerta Machuca, Peru, July 27, 2007, para. 73.

30. By virtue of the above, the IACHR finds that the petition does not meet the admissibility requirement set forth in Article 46(1)(a) of the American Convention. Consequently, the Commission refrains from considering the other admissibility requirements set forth in the Convention, as it is not a matter properly before it.

V. CONCLUSIONS

31. The Commission has established that the instant petition does not meet the requirement set forth in Article 46(1)(a) of the American Convention. Therefore, the Commission concludes that the petition is inadmissible under Article 47(a) of the American Convention.

32. Based on the foregoing arguments of fact and law:

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition inadmissible.
2. To notify the parties of this decision.
3. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 4th day of the month of March, 2008.
(Signed): Paolo G. Carozza, Chairman, Luz Patricia Mejía Guerrero, First Chairwoman; Felipe González, Second Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Florentín Meléndez, members of the Commission.