Institution:	Inter-American Commission on Human Rights
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Title/Style of Cause:	The National Association of Ex-Employees of the Peruvian Social Security Institute (ASEIPSS) v. Peru
Doc. Type:	Report
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo G. Carozza.
Dated:	27 March 2009
Citation:	ASEIPSS v. Peru, Case 12.670, Inter-Am. C.H.R., Report No. 38/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANTS: the Civil Association NGO Protection of International Rights and Social Development in Latin America and the Caribbean, and the Bar Association of Cuzco
Editor's Comment:	The title of the present case includes footnote 1 that says "This report joins the petitions registered as 957/05 (lodged by the Association of Ex-Employees of the Peruvian Social Security Institute (ASEIPS)), 1049/05 (presented by the National Association of Pensioners of Banco de la Nacion), 1177/05 (presented by the National Retirees Federation (CENAJUPE)), 1286/05 (presented by the Federation of Workers and Ex-Employees of the Health Insurance Service), 1287/05 (filed by the Association of Retirees of ENAPU S.A.), and 1414/05 (presented by the Bar Association of Cuzco)."
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I. SUMMARY

1. Between August and December 2005, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission”, or “the IACHR”) received six petitions which alleged the international responsibility of the Republic of Peru (hereinafter "Peru", "the State" or "the Peruvian State") for the purported violation of human rights recognized in Articles 2 (Duty to adopt domestic legal provisions), 4 (Right to life), 10 (Right to compensation), 17 (Rights of the family), 21 (Right to property), 24 (Right to equal protection), 25 (Right to judicial protection), and 26 (Progressive development) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) in connection with the obligations contained in Article 1(1) of that instrument. The petitioners also claim violation of rights protected in Articles II (Right to equality before the law), XVI (Right to social security), XVIII (Right to a fair trial), and XXIII (Right to property) of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration” or “the Declaration”);

and in Article 9 (Right to social security) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador").

2. The petitioners held that the constitutional reform introduced by Law 28389, published on November 17, 2004, and Law 28449, published on December 30, 2004, modified the pension system governed by Decree-Law 20530 (Law on the Pension and Compensation System for Civil Servants Not Covered by Decree-Law 19990), the core effect of which was to entitle its beneficiaries to receive a pension equalized with the wages, bonuses, and benefits received by an active civil servant performing the same or similar functions as the pensioner had upon retirement. The petitioners are associations, unions, and organizations that represent terminated and retired employees who qualify as pensioners and were covered by the pension regime under Decree-Law 20530.

3. For its part, in its first communication, the State indicated that the requirements of admissibility were met. In ensuing briefs, the State argued that petitions 957/05, 1049/05, and 1286/05 were inadmissible, claiming that they had not met the requirement of prior exhaustion of remedies under domestic law. As to arguments on merits, the State noted that the constitutional reform was compatible with the American Convention and that its purpose, among other things, was to eliminate inequity in the public sector pensions system. The State also held that the reform did not entail an impairment of the core content of the right to a pension to the detriment of the petitioners.

4. Having analyzed the position of the parties, the Inter-American Commission found that the petition is admissible and that the Peruvian State did not violate the rights enshrined in Articles 21, 26 and 25 of the American Convention or the obligations contained in Articles 1(1) and 2 of said instrument. The Commission concluded, furthermore, that the instant case is inadmissible as regards the alleged violations of rights protected in Articles 4, 10, 17, and 24 of the Convention.

5. It should be noted that this report on admissibility and merits deals exclusively with the constitutional reform of 2004 which modified the pension regime under Decree-Law 20530. The Commission continues to process an array of joined petitions submitted by a number of the victims in the instant case that concern failure to comply with judicial decisions ordering the payment of pension amounts resulting from the application of this Decree-Law while it was in force.

II. PROCESSING BY THE COMMISSION

6. The Commission received petition 957/05 from the National Association of Ex-Employees of the Peruvian Social Security Institute (ASEIPSS) on August 23, 2005. On November 25, 2005, the Civil Association NGO Protection of International Rights and Social Development in Latin America and the Caribbean (APRODIAC) informed the Commission of its joinder to the petition.

7. The petitioners submitted additional observations in a communication of October 14, 2005. Subsequently, in a communication dated November 9, 2005, the petitioners requested a hearing before the IACHR in order to set out their case. By the same token, the Center of Labor Consultancy of Peru (CEDAL) requested a work meeting on January 16, 2006. In response, the Commission convened a work meeting at its 124th regular session on March 8, 2006, to address the situation of the human rights of pensioners in Peru. That same day, the Meeting of Presidents of Associations of Law 20530 Retirees submitted additional information.

8. Petition 1049/05, was received on September 6, 2005. The petitioners furnished additional information on October 28, 2005.

9. Petition 1177/05 from the National Retirees Federation of Peru (CENAJUPE) was received on October 19, 2005. The petitioners subsequently supplied additional information on February 14, 2006.

10. On November 1, 2005, the IACHR received petitions 1286/05 and 1287/05, from the Federation of Workers and Ex-Employees of the Health Insurance Service (CFTESSALUD) and the Association of Retirees of the National Company of Ports S.A., General San Martín Port Terminal (ACJENAPU-Pisco), respectively.

11. Petition 1414/05 from the Bar Association of Cuzco was received on December 8, 2005.

12. On May 1, 2006, the Inter-American Commission on Human Rights decided, pursuant to Article 29(d) of its Rules of Procedure, to join petitions 1049/05, 1286/05, 1287/05, 1177/05, and 1414/05 and process them together as petition 957/05 because the allegations they contained addressed the same facts. On that same date the IACHR relayed the pertinent portions of the petitions to the government of Peru and gave it two months to respond, in accordance with Article 30 of its Rules of Procedure.

13. On July 26, 2006, the State submitted Brief 85-2006-JUS/CNDH-SE/CESAPI, which was forwarded to the petitioners.

14. The National Association of Ex-Employees of the Peruvian Social Security Institute (ASEIPSS) submitted comments on the State's brief in communications dated September 19 and October 12, 2006.

15. In response to a request for a hearing, on September 19, 2006, the Commission invited the parties to a public hearing, which was held on October 19, 2006 in the framework of the 126th Regular Session of the IACHR.

16. On November 1, 2006, the State presented Brief 120-2006-JUS/CNDHSE/CESAPI. On December 8, 2006 the State submitted Brief 142-2006-JUS/CNDH-SE/CESAPI. On December 28, 2006, the State presented Brief 313-2006-EF/65, prepared by the Ministry of Economy and Finance. This brief was supplemental to Brief 142-2006-JUS/CNDH-SE/CESAPI. On May 31, 2007, the State submitted Brief 62-2007-JUS/CNDH-SE/CESAPI. All of these briefs were relayed to the petitioners.

17. On March 22 and June 25, 2007, the Bar Association of Cuzco presented its observations on the State's briefs. The National Association of Pensioners of the Nation's Bank submitted additional information on October 18, 22, and 24, 2007.

18. The State put forward additional observations in communications received on June 15 and 27, 2007.

19. On September 21, 2007, the International Commission of Jurists presented an amicus curiae brief in the framework of the proceedings on the instant petition. The IACHR forwarded said document to the parties on December 11, 2007.

20. CEDAL submitted additional observations on September 18, 2007.

21. On October 3, 2008, the Commission wrote to the parties informing them that, in accordance with Article 37(3) of its Rules of Procedure, it had decided to defer its analysis of admissibility until the stage on merits in the case, due to the link between both analyses. At the same time the Commission also requested the petitioners to present their observations on the merits of the petition within a period of two months.

22. On December 4, 2008, the National Association of Retirees of National Company of Ports S.A., National Association of Pensioners of the Nation's Bank, Bar Association of Cuzco and Retirees Federation, presented their observations on merits. On December 16, 2008, the IACHR received observations on merits from the National Association of Ex-Employees of the Peruvian Social Security Institute. All of these communications were transmitted to the State on December 29, 2008, at which time it was requested to present its observations on merits within two months.

23. On January 12, 2009, CEDAL submitted comments. Those comments were forwarded on that same day to the State, which was given two months to present its observations. On March 13, 2009 the State presented its observations on the merits, which were transmitted to the petitioners for their knowledge on March 16, 2009.

III. POSITIONS OF THE PARTIES

A. The petitioners

24. The joined petitions disputed the constitutional and legislative reform introduced in 2004 in order to permanently terminate the pension regime under Decree-Law 20530 of 1974. The petitioners say that the principal characteristic of the regime was that it entitled its beneficiaries to a pension equalized with the remuneration received by an active civil servant holding the same or a similar post as the pensioner upon the latter's retirement or termination, which, they argued, enabled their pensions to preserve their real purchasing value.

25. As regards contributions, they noted that originally under the Decree-Law 20530 regime the contributions that active employees had to make were 8%, 12%, or 15%, depending on the

amount of the remuneration. They mentioned that subsequently the contribution was set at 12%, of which the worker paid 6% and the employer the other 6%. They added that the contributions paid by workers belonging to the other public sector pension regime, namely the one governed by Decree-Law 19990, were set by executive decree, with the employee required to pay one third while the employer paid two thirds.

26. The petitioners said that in 1993, the Constitution introduced a broader protection to the Decree-Law 20530 pension regime by stipulating in its First Final and Transitory Provision that any new social security systems introduced in the future would not affect the rights recognized in the regimes under Decree-Laws 19990 and 20530.

27. They also said that in numerous judgments on actions for amparo the Constitutional Court, which has the last word on the interpretation of the Peruvian Constitution, concluded that no law could repeal or amend to the detriment of pensioners the legal framework in force at the time the pensions were awarded. In that regard, the petitioners hold that the Constitutional Court converted the pensions governed by the regime introduced by Decree-Law 20530 into equalizable pensions, without caps and not subject to review.[FN2] It also found that the correct interpretation of the rule contained in the First Final and Transitory Provision of the Peruvian Constitution of 1993 "can only be that of constitutionally enshrining the acquired pension rights of pensioners under the regimes contained in Decree-Laws 19990 and 20530, acquired rights being defined as those that have come into our possession, that are a part of our possessions, and of which we cannot then be dispossessed by those who granted them to us."[FN3]

[FN2] As an example, the petitioners cite Case 008-96-I/TC of March 10, 2003, published on April 24, 2003.

[FN3] The petitioners cite the ruling in Case 007-96-I/TC of April 23, 1997, which provided, "Since the main effects of inclusion in the Decree-Law 20530 regime are to: 1) become a pensioner under that regime; 2) be entitled to acquire the right to a pension on completion of fifteen years of service in the case of men and twelve and one half years of service in the case of women, which entitlement is governed by the provisions contained in Articles 5 and 31, which accord the right to an equalizable pension, subject to the conditions set forth in the aforementioned Decree-Law, therefore, all of the foregoing constitute acquired rights in accordance with the First Final and Transitory Provision of the Constitution in force."

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28. The petitioners held that the Constitutional Court always ruled in favor of pensioners, and noted that any attempted legal restructuring of the regime in question first required a constitutional reform.

29. They mentioned that on April 15, 2004, the then-President of the Republic, Alejandro Toledo Manrique, and the then-President of the Council of Ministers, Carlos Ferrero Costa, submitted to the Congress of the Republic a constitutional reform bill amending Articles 11 and 103 of the Constitution of 1993 as well as the First Final and Transitory Provision thereof. They explained that the bill was put into effect through the enactment of two laws: Law 28389 (Reform Law on Articles 11, 103, and the First Final and Transitory Provision of the

Constitution of Peru) and Law 28449, which introduced new rules on the Decree-Law 20530 pension regime.

30. According to information supplied by the petitioners, the changes brought in by the constitutional reform may be summarized as follows:

1. Creation of a national government entity to administer the pension systems under state supervision;
2. Abolition of the principle of "acquired rights" in favor of that of "fait-accompli" (hence the immediate application of the new rules);
3. Permanent closure of the regime under Decree-Law 20530 for the purposes of admission of new workers;
4. Discontinuation of pension equalization;
5. Introduction of a minimum pension (Tax Unit);
6. Gradual imposition of caps in excess of one Tax Unit;
7. Creation of a maximum cap of two Tax Units; and
8. Promulgation of Law 28449 to substitute the content of Decree-Law 20530 and impose new systems of calculation of pensions and caps on the pensions to be received by pensioners or their beneficiaries.

31. The petitioners said that Laws 28389 and 28449 were challenged in an unconstitutionality proceeding which the Constitutional Court settled in a judgment published on June 12, 2005. According to the petitioners, the Court ruled that the petitions challenging the constitutionality of the reform were unfounded on the grounds that the reform was carried out in accordance with the procedure provided in the Constitution and that the reform respected the core content of the fundamental right to a pension; that the progressive and universal nature of the institutional guarantee of social security was not impaired; and that there was no impediment to any increase in the quality of life or observance of the pensioners' rights to equal treatment and property.

32. As to the effects of the constitutional reform, the petitioners hold that the acquired rights of all 320,331 beneficiaries of Decree-Law 20530 were disavowed, to the extent that the reform prohibited equalization of their pensions with the permanent remunerations received by active workers in similar or equivalent posts, and that it lowered all pensions higher than two tax units, resulting not only in an assault on the human dignity of those affected but also seriously impairing their quality of life. They also indicated that following the constitutional reform, the 48% of pensioners who are over 65 years old were only given increases that were insufficient to compensate for even 50% of the cumulative inflation of the past four years. They added that those under 65 years old, who account for 52%, have not been granted any increase whatever.

33. The petitioners argued that even though the government announced savings would be generated that would be used to carry out social policies in favor of education and health, time has shown that those policies were never put into effect and that public spending in those areas has decreased.

34. The petitioners said that the reform did away with the principle in the pension system of acquired rights, which were safeguarded by the rule of non-retroactive application of laws

enshrined in Article 103 of the Constitution of 1993. They noted that this principle, which was recognized in the Constitution prior to its reform, prohibited the application of a new law to events or situations that originate, occur, or are consummated under the aegis or within the frame of application of the old law. They drew attention to the fact that this principle was recognized in the express prohibition set forth in the text of the First Final and Transitory Provision of the 1993 Constitution against the impairment by any new laws of the rights of the pensioners under the 20530 and 19990 systems.

35. They indicated that following the reform of the aforesaid Article 103 the criteria changed, given that preeminence is now accorded to the recent introduced provision -making it mandatory- and to the power of the State to amend mandates under the so-called "principle of fait-accompli". According to the petitioners, the immediate application of laws to extant legal effects and situations was legitimized. The petitioners hold that this reform has completely abolished the rule of acquired rights except in matters of criminal law.

36. In sum, the petitioners argue that both the constitutional and the legal reforms violated the human rights of the pensioners enshrined in Articles 4, 10, 17, 21, 24, 25, and 26 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, in addition to Articles XVI of the American Declaration and 9 of the Protocol of San Salvador, which recognize the right to social security. Some petitioners also include arguments alleging violation of various articles of the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights.

37. As regards the right to property, the petitioners argued that the equalization element is part of the core content of their pension. In their opinion, the State violated their right to property by failing to respect a benefit previously acquired and incorporated as part of the pensioners' property. As to the argument of the State that the constitutional reform did not impair said core content of the right to social security, the petitioners argue that what should be taken into account is the core content of the right of the pensioners covered by Decree-Law 20530 and not Peruvian society at large. The petitioners indicated that Inter-American Court sustained this position in the "Five Pensioners" Case, in which it found, "When they met the requirements of Decree-Law 20530, the pensioners under this regime acquired the right to their pensions being regulated by the terms and conditions established in this decree law and its related norms. In other words, the pensioners acquired a right to property related to the patrimonial effects of the right to a pension, in accordance with Decree Law No. 20530 and as established in Article 21 of the American Convention."

38. The petitioners also argued that even if it had been necessary for the State, for reasons of general welfare or social interest, to reduce the pension amount of the former workers and retirees, under Article 21 of the American Convention, the pensioners were entitled to receive just compensation as it constituted an expropriation, which has not occurred in the instant case.

39. Furthermore, the petitioners argued that the State violated its duty to ensure the progressive realization of rights as part of implementing the right to social security. According to the petitioners, in its judgment the Constitutional Court overlooked the fact that the rights to

social security and progressive development –though also collective in nature– are rights borne by the individual.

40. The petitioners also questioned the constitutional procedure by which the legislature reformed the Constitution and the Decree-Law 20530 regime. As regards the Constitutional Court's decision of June 3, 2005, they say that it is neither consistent with nor meets minimum standards of “legal tenability”.

41. The petitioners claimed that the constitutional reform process failed to take into account or consult civil society organizations, in order to hear their opinions and consider all points of view on such a delicate issue as social security and pension rights. They contended that the parliamentary report on the bill that was debated in Congress contains no summary of the opinions put forward by civil society, which, therefore, constituted a violation of Article 70 of the Rules of Procedure of the Congress of the Republic.

42. They also argued that the constitutional and legal reform unlawfully abridged core components of human rights protected not only by the Constitution, but also by international treaties. They held that the Peruvian Constituent Assembly was "materially limited"; that is, it was limited by the material values and fundamental principles that give the constitutional text its identity or constitute its essence, such as the preeminence of the person, dignity, life, equality, the rule of law, and nondiscrimination. In that connection, they claimed that the constitutional reform modified legally acquired pension rights without legitimate authority to do so.

43. Some petitioners also indicated that the reform infringed the right to equal protection since other groups of pensioners in the country, such as those who receive armed forces pensions, are still entitled to equalization without the State having adopted any restrictive measures with respect to them.

44. Finally, a number of petitioners argued that the constitutional reform rendered unenforceable previously adopted judgments on actions for amparo in their favor which ordered payment of the amounts necessary for the equalization of their pensions in accordance with Decree-Law 20530.

45. The petitioners put forward a range of arguments with respect to the requirement of exhaustion of domestic remedies and the deadline for lodging the petition. One group of petitioners argued that the IACHR should take into consideration decisions on actions for amparo adopted in their favor in 2001 and 2004, enforcement of which is still pending. Another group of petitioners provided information about an amparo action against the Congress of the Republic and the Council of Ministers lodged with the 48th Specialized Civil Court of Lima alleging the imminent threat of violation of the pensioners’ constitutional rights inasmuch as the constitutional reform bill was in the process of adoption by Congress. In general, all the petitioners concur that domestic remedies were exhausted with the unconstitutionality action against the reform, on which the Constitutional Court rendered a decision with erga omnes effects on June 3, 2005.

B. The State

46. The State described the content of the reform in detail, indicating that it amended Articles 11 and 103, as well the First Final and Transitory Provision, of the Peruvian Constitution. As regards Article 103, the previous text, which recognized the acquired rights principle, was completely replaced. The State indicated that the relevant part of the new provision provides that, "The law, upon entry into force, will apply to the consequences of extant legal situations and relationships…" With that, the State noted, the fait-accompli theory was expressly opted for, enabling the legislative reforms to be applied forthwith to all active employees and pensioners under the Decree-Law 20530 regime. Finally, the State mentioned that the amendment to the First Final and Transitory Provision terminated the Decree-Law 20530 pension regime.

47. The State mentioned that the Constitutional Court, in its judgment of June 3, 2005, ruled that the reform of the pension regime under Decree-Law 20530 was constitutional. The State stressed that the constitutional reform procedure was carried out strictly in accordance with Article 206 of the Peruvian Constitution and that the essential content of the fundamental right to a pension was observed, as the aforementioned judgment of the Constitutional Court found. According to the State, the joined petitions dispute a reform whose formal propriety, content, and compatibility with international instruments has been verified and endorsed by the supreme organ for constitutional oversight in Peru.

48. The State argued that the reform did not entail an abolition or revocation of pension rights or integral elements thereof. It held that no rights have been revoked nor does the situation constitute an adverse reform but, rather, a change to certain conditions in the pension benefit and in the way equalization is carried out. As far as the State is concerned, no rights were eliminated but, rather, a different form of regulation was introduced.

49. The State underscored that the constitutional reform was carried out lawfully and with respect for the right to equality; motivated by reasons of public utility or social interest, and designed to preserve the general welfare or the common good within a democratic society. In the opinion of the State, the constitutional reform process and the legislation passed comply in full with the conditions established with regard to the right to property in the American Convention, which have been developed by the case law of the Inter-American Court.

50. The main argument advanced by the State to justify the reform was that to continue with the Decree-Law 20530 regime would have a devastating effect on the State's financial position. It drew attention to the fact that the new rules established for the regime are founded on the principles of equity and general welfare.

51. The State reiterated that the three main characteristics of the Decree-Law 20530 regime that necessitated change were the excessive cost, length of service without a minimum age, and inequity.

52. As regards the cost, the State noted that according to information provided by the Ministry of Economy and Finance, from 1974 to 2003, the State paid a sum equivalent to US$26,802 million more than it collected in contributions under Decree-Law 20530. With respect to the fact that the pension was determined based on length of service without

considering a minimum age, the State said that this gave rise to a situation in which it was impossible to determine how many new pensioners would reach that length of time each year. The State held that this feature of the regime encouraged workers to take retirement while still in the prime of their working lives.

53. On the question of inequity, the State argued that the Decree-Law 20530 regime was unfair to public servants who belonged to the other government pension regime in place in Peru. The State explained that a comparison of the Decree-Law 20530 regime with the general regime under the National Pension System shows that 73% of pensioners under the former are paid more than the maximum pension permitted under the latter.

54. The State noted that in spite of all its drawbacks, the Decree-Law 20530 regime was kept in place as a result of the First Transitory Provision of the Constitution of 1993, which provided that none of the rights legally obtained under Decree Laws 19990 and 20530 could be affected by any new compulsory social security regimes applicable to government pensions. It was precisely this situation that made a constitutional reform necessary.

55. The State mentioned that the fiscal saving generated by the application of the new pension rules would be used to increase the lowest pensions, in accordance with the law. The State also informed that the reform included the introduction of new rules in the pension regime as follows: "The pensions of pensioners aged 65 and over will be adjusted annually bearing in mind cost-of-living changes and the financial capacity of the State, the purpose being to maintain the purchasing power of the pension and prevent its decline as a result of inflation."

56. In its observations on the merits, the Peruvian State pointed out that the reform has allowed the increase of the lowest pensions of the regime and has annually readjusted the pensions of the pensioners' over 65 years old. The State explained that as of January 2005, no pensioner of the Law 20530 regime perceives a pension inferior to the S/. 415[FN4], similar to the regime of the Law 19990 and the Private Pension System. The State emphasized that the increases in the pensions has favored 97,176 beneficiaries whose pensions were not superior to S/. 800. The State also talked about other increases that have been feasible by the savings that the reform has generated. By means of Law 28666 of January 11, 2006 an increase of 25% of the pensions by widowhood in the regime of Law 19990 was granted. It added that as of January 2008, an increase of S/. 50 was given to the pension of the retirement and disability beneficiaries.

[FN4] Approximately 140 US dollars.

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57. On the other hand, the State indicated that the reform not only has allowed to increase the amounts of the lowest pensions, but to extend the number of pensioners covered by means of the of the System of Social Pensions (created in June 2008) which incorporates other social and productive sectors of Peru, like workers of smaller micro-enterprises over 55 years old. In addition, the State emphasized a series of measures in the field of health and education, detailing that the cost of health, education, cleaning and social protection presents a constant increase.

58. The State concluded that no rights have been done away with since: i) no beneficiaries of Decree-Law 20530 had their right to a pension eliminated; ii) the right to pension adjustments was not eliminated; rather, different rules were adopted in this regard, giving priority to those who receive lower pensions; and, iii) a maximum pension was set, the amount of which is reasonable and proportionate in the context of a social and economic situation that makes it feasible and necessary.

59. As regards admissibility requirements, the State put forward different arguments for each petition. With respect to petition 1049/05, the State noted that the petitioners took recourse to the courts in the form of an action for amparo, which was accepted by the Superior Court of Justice in a decision of October 6, 2004. However, the State observed that said judicial process has not yet concluded and, therefore, the alleged victims have not exhausted domestic remedies. As to petition 1287/05, the State indicated that the alleged victims filed an action for amparo against the constitutional reform, which was dismissed at first instance. The State noted that the petitioners did not challenge this decision and, therefore, had not exhausted domestic remedies.

60. As for petitions 1177/05, 1286/05, and 1414/05, the State mentioned that the alleged victims were party to the unconstitutionality action brought against Laws 28389 and 28449. The State indicated that said proceeding culminated in the Constitutional Court's judgment of June 3, 2005, which it ruled that the laws were lawful, just, and equitable.

61. With respect to the petitioners' arguments that the reform rendered “unenforceable” judgments on actions for amparo previously adopted in their favor, the State acknowledged the existence of proceedings in which judgments in favor of the pensioners were in the process of enforcement. In that regard, the State affirmed that in those cases, the right to equalization would be recognized and respected up to the date of entry into force of the constitutional reform and that the judicial proceedings to determine the manner in which the judgments should be carried out were still in progress.

IV. ANALYSIS OF ADMISSIBILITY

A. Matter precedent: Determination of the subject matter of the case

62. The parties put forward arguments on alleged violations arising from the constitutional reform in two regards: i) The petitioners question the compatibility of the reform itself with the American Convention and other inter-American instruments; and, ii) the petitioners consider that, as a result of the reform, the judgments on actions for amparo previously delivered in their favor became unenforceable.[FN5]

[FN5] This argument was propounded by the petitioners in case 957/05.

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63. The Commission is processing another petition which at present is at the admissibility stage, the main subject of which is the alleged non-compliance with the judgments on the actions for amparo that the petitioners claim to be "unenforceable" because of the constitutional reform.

These arguments have been left out of the analysis in the instant report as they will be examined in the context of the aforementioned petition. Accordingly, the following analysis of admissibility and merits is confined to the arguments on the first point, to wit, the constitutional reform's alleged incompatibility with the Convention and other inter-American instruments.

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

64. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the IACHR. The petition names as alleged victims individuals on whose behalf the Peruvian State undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Peru has been a party to the American Convention since July 28, 1978, when it deposited its instrument of ratification. Thus, the Commission has ratione personae competence to examine the petition.

65. The foregoing notwithstanding, as regards petition 1414/05 the Commission notes that it was presented by the Bar Association of Cuzco on behalf of "all the pensioners, without exception." The petitioners argued that the citizenry in general, as well as all pensioners under the different pension regimes, have been harmed by the constitutional and legal reform that came into force in 2005. In that connection, while it is admissible for a petitioner to submit a petition on behalf of other persons or alleged victims, the Commission reiterates its jurisprudence to the effect that

"[t]he liberal standing requirement of the inter-American system should not be interpreted, however, to mean that a case can be presented before the Commission in abstracto. An individual cannot institute an actio popularis and present a complaint against a law without establishing some active legitimation justifying his standing before the Commission. The applicant must claim to be a victim of a violation of the Convention, or must appear before the Commission as a representative of a putative victim of a violation of the Convention by a state party.[FN6]

[FN6] IACHR. Report 88/03. Metropolitan Nature Reserve v. Panama, October 22, 2003, par. 30, citing IACHR, Case 11.553, Report 48/96 (Costa Rica), Annual Report of the IACHR, 1996.

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66. Based on the foregoing, for a petition to be admissible, there must be specific, individually identified victims. The IACHR reiterates that it does not admit actio popularis petitions, that is, on behalf of the entire population of a country, a position applicable in the instant case. The naming of all the pensioners as alleged petitioners is not sufficiently specific such that they constitute a defined and identifiable group for the purposes of Article 32 of the Rules of Procedure of the IACHR.[FN7] Accordingly, petition 1414/05 is inadmissible because the Commission lacks personal jurisdiction.

[FN7] The Commission notes that, by contrast, the other petitions were presented on behalf of groups defined as members of particular pensioners Associations.

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67. The Commission is competent ratione loci to examine the petition because it alleges violations of rights protected in the American Convention that are purported to have occurred within the jurisdiction of the State. The Commission is competent ratione temporis to examine the complaint because the obligation to observe and ensure the rights protected in the American Convention was already binding upon the State at the time the events described in the petition are alleged to have occurred.

68. Finally, the Commission has ratione materiae competence because the petition alleges violations of human rights protected by the American Convention. While the petitioners allege violation of Articles II (right to equality before the law), XVI (right to social security), XVIII (right to a fair trial), and XXIII (right to property) of the American Declaration, the Commission notes that the fundamental rights that the State undertook to uphold as a party to the OAS Charter are those set forth in the American Declaration, which constitutes a source of international obligation.[FN8] However, the Peruvian State ratified the American Convention and, therefore, from that point forward, that instrument became the principal source of its legal obligations.[FN9] Therefore, bearing in mind that the Convention protects the rights which the petitioners claim to have been violated, the analysis of merits in the instant case will center on the American Convention.

[FN8] I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, paras. 43-46.
[FN9] Idem, par. 46.

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69. The Commission finds that the petitioners also alleged violation of the right to social security enshrined in Article 9 of the Protocol of San Salvador. In this regard, the Commission notes that Article 19(6) of the said treaty contains a clause granting limited jurisdiction to the organs of the inter-American system, enabling them to examine individual petitions concerning the rights protected in Articles 8(a) and 13. Therefore, the Commission does not have subject matter jurisdiction to examine alleged violations of Article 9 of the Protocol of San Salvador, notwithstanding its competence to analyze the right to social security in the light of the American Convention under the terms set out hereinbelow (see pars. 130-133).

70. Finally, with regard to the possible violations of the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights, the Commission notes that these are not instruments adopted in the regional jurisdiction of the inter-American system. Having said that, the foregoing does not preclude their use as sources of interpretation in the decision in the instant case.

C. Other admissibility requirements

1. Exhaustion of domestic remedies

71. Article 46(1)(a) of the American Convention provides that admission of petitions lodged with the Inter-American Commission in keeping with Article 44 of the Convention shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve them before they are taken up in an international proceeding.

72. The State invoked the objection of failure to exhaust the remedies under domestic law with respect to petitions 1049/05 and 1287/05.

73. As regards petition 1049/05 (National Association of Pensioners of the Nation's Bank), the State contended that the petitioners had failed to exhaust the domestic remedies available to them to challenge the constitutional reform since the action for amparo which was admitted at first instance by the Superior Court of Justice on October 6, 2004 is pending a decision at second instance.

74. As to petition 1287/05 (Federation of Workers and Ex-Employees of the Health Insurance Service), the State noted that although the petitioners brought an action for amparo against the constitutional reform, that petition was refused at first instance and they had failed to enter an appeal challenging said decision.

75. The Commission finds that the subject of all the petitions is the alleged violation of the American Convention as a result of the constitutional reform of the pension regime under Decree-Law 20530. In response to the unconstitutionality actions interposed by the pensioners affected by the reform, on June 3, 2005, the Constitutional Court returned a judgment in which it ruled that the reform was constitutional. The Commission notes that under Peruvian domestic law, specifically pursuant to Article 82 of the Peruvian Code of Constitutional Procedure, such decisions produce generally applicable effects.[FN10] Given the nature of the case, the Peruvian Constitutional Court, in use of its powers, adopted not only a mandatory decision at final instance, but also a judgment that had an erga omnes effect generally applicable to all third parties and branches of government. Accordingly, the Commission considers that this decision put an end to any possibility of further dispute on the subject in the domestic jurisdiction and, therefore, that domestic remedies must be considered exhausted in relation to all of the petitions.

[FN10] Article 82 of the Peruvian Code of Constitutional Procedure provides, "Final judgments of the Constitutional Court in unconstitutionality proceedings (...) have the force of res judicata and, therefore, are binding on all branches of government and produce generally applicable effects upon publication."

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2. Timeliness of the petition

76. Article 46(1)(b) of the Convention provides that, in order to be admissible, a petition must be lodged within six months of the date when the complaining party has been notified of a final decision handed down at the national level.

77. The Commission notes that petition 957/05 was lodged on August 23, 2005; petition 1049/05 was presented on September 6, 2005; petition 1177/05 was filed on October 19, 2005; petition 1286/05 was lodged on November 1, 2005, and petition 1287/05 was presented on November 1, 2005. Therefore, bearing in mind that the judgment of the Constitutional Court that declared the reform of the pension regime to be constitutional was delivered on June 3, 2005, and published in the Official Gazette "El Peruano" on June 12, 2005, the aforesaid petitions were filed in a timely manner, in accordance with the rules set down at Article 46(1)(b) of the Convention.

3. Duplication of international proceedings and res judicata

78. There is nothing in the record to suggest that the subject matter of the joined petitions is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by it or by another international organization. Therefore, the Commission finds that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

D. Colorable claim

79. For the purposes of admissibility, the IACHR must decide, pursuant to Article 47(b) of the American Convention, whether the petition states facts that could constitute a violation of same, or, pursuant to paragraph (c) of the same article, whether the petition is "manifestly groundless" or "obviously out of order. The standard by which to assess these extremes is different from the one needed to decide the merits of a petition. The IACHR must perform a prima facie evaluation and determine if the complaint provides grounds for an apparent or potential violation of a right guaranteed by the American Convention, although not whether the violation has in fact occurred. This examination is a summary analysis that does not imply a prejudgment or preliminary opinion on the merits.

80. Taking into account the link between the admissibility and the merits, the Commission, according to its substantial analysis infra, considers that the facts narrated by the petitioners could characterize violations of rights recognized in Articles 21, 26, and 25 of the American Convention, in connection with the obligations set forth at Articles 1(1) and 2 of said treaty. In the merits stage the IACHR will assess whether or not the measure adopted by the State with respect to the pension regime was compatible with the standards established in the American Convention as regards restrictions on the exercise of rights. The IACHR finds that the petitioners have not put forward sufficient evidence to show a prima facie violation of the rights enshrined in Articles 4, 10, 17, and 24 of the American Convention.

V. ESTABLISHED FACTS

81. The Commission observes that the parties do not dispute the facts in the instant case, which will be narrated in the following order: i) Decree-Law 20530 and its pension regime; ii) The Constitution of 1979 and Law 23495 of November 20, 1982; iii) The Constitution of 1993 and the principle of acquired rights; iv) The constitutional and legal reforms introduced by Laws 28389 and 28449, respectively; and, v) The judgment of Constitutional Court.

A. Decree-Law 20530 and its pension regime

82. Decree-Law 20530 (Law on the Pension and Compensation System for Civil Servants Not Covered by Decree-Law 19990) was promulgated on February 27, 1974. The relevant parts of that law provided as follows:

Article 4. Workers acquire the right to a pension upon completing 15 years of actual remunerated service in the case of men, and 12 1/2 years in the case of women.

Article 7. Pensionable remunerations and pensions are liable to a deduction for pensions according to the following scale:

- Up to S/. 10.000…….8%
- Between S/. 10.000 and
  and S/. 20.000……..12%
- Over S/. 20.000……15%

(…)

Article 49. Pensions are renewable when:

a) Upon retirement, the worker has completed 30 or more years of service in the case of men, or 25 or more years of service in the case of women, are 60 or 55 years old or over, respectively, and have not been rendered ineligible by a final judicial decision or dismissed as a disciplinary measure;
b) The pensioner reaches 80 years of age, regardless of their length of service;
c) The disability pension has been awarded pursuant to Article 19;
d) The survivor's pension originates from a renewable pension; and
e) The survivor’s pension has been awarded pursuant to Article 26.

Article 50. The renewal of pensions shall be done based on amendments to the Remuneration Scale; be processed ex officio; be approved by order of the Chief of the Respective Budget Unit; and enter into effect from the month following that in which the aforementioned scale was amended.[FN11]

[FN11] Decree-Law 20530, promulgated on February 27, 1974.

B. The Constitution of 1979 and Law 23495 of November 20, 1982

83. The Eighth Transitory Provision of the Constitution of 1979 established the right to progressive equalization of pensions of dismissed workers with more than 20 years of service, in the following terms:

EIGHTH.- The pensions of dismissed and retired public administration workers with more than 20 years of service who do not come under the Social Security Service regime or other special regimes are progressively equalized with the wages of active public servants in the respective categories for a period of 10 fiscal years, starting from January 1, 1980, and must be included in the Budget of the Republic under the appropriate headings.[FN12]

[FN12] Constitution of the Republic of Peru of 1979.

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84. Decree-Law 23495 of November 20, 1982, and its Regulations developed the above constitutional rule, introducing the right to automatic progressive equalization in favor of the beneficiaries of Decree-Law 20530:

Any post-equalization increase awarded to active public servants in the same or a similar position to the last position held by the dismissed or retired worker shall give rise to the same pension increase to which the active public servant is entitled.[FN13]

[FN13] Law 23495, promulgated on November 20, 1982.

C. The Constitution of 1993 and the principle of acquired rights

85. The Constitution of 1993 established the guarantee of freedom from ex post facto laws and elevated the pension regimes under decree laws 199090 and 20530 to the category of acquired rights in the following terms:

Article 103. Special laws may be issued when the nature of circumstances so demands but not by reason of differences between persons.

No law shall have retroactive force or effect, except in criminal matters and when it favors the offender.

A law may only be repealed by another law. A law is also rendered void by a judgment that rules it unconstitutional.

The Constitution does not uphold abuse of rights.

(…)

First Final and Transitory Provision: New compulsory social security regimes applicable to government pensions do not affect legally obtained rights, in particular those corresponding to the regimes under Decree-Laws 19990 and 20530 and amendments thereto.[FN14]

[FN14] Constitution of the Republic of Peru of 1993.

D. The constitutional and legal reforms introduced by Laws 28389 and 28449, respectively

86. Law 28398 (Constitutional Reform Law), which reformed Articles 11 and 103 of the Constitution as well as the First Final and Transitory Provision thereof, was published on November 17, 2004. Where relevant for the purposes of the instant case, the Law amended Article 103 of the Constitution as follows:

Special laws may be issued when the nature of circumstances so demands but not by reason of differences between persons. Upon its entry into force a law applies to the consequences of existing legal relationships and situations and does not have retroactive force or effect except in criminal matters when it favors the offender. A law may only be repealed by another law. A law is also rendered void by a judgment that rules it unconstitutional.

The Constitution does not uphold abuse of rights.

87. Article 3 of said law modified the First Final and Transitory Provision as follows:

The pension regime of Decree-Law 20530 is declared permanently closed. Therefore, upon the entry into force of this constitutional reform:

1. No further persons shall be admitted or readmitted to the pension regime of Decree-Law 20530.
2. Any workers belonging to the aforesaid regime who have not met the requirements to receive the corresponding pension must opt for either the National Pension System or the Private Pension Fund System.

For reasons of social interest, the new pension rules established by law shall apply immediately to all workers and pensions in state pension regimes, as appropriate. Said rules shall not provide for the equalization of pensions with wages, or for the reduction of the amount of pensions that are lower than one tax unit.

The fiscal saving generated by the application of the new pension rules will be used to increase the lowest pensions, in accordance with the law. Any modifications introduced to the present pension systems and to any new pension systems created in the future must be guided by the principles of financial sustainability, not equalization.

The appropriate entity of the national government is authorized to initiate the necessary legal actions to declare null and void any unlawfully obtained pensions, except in cases settled by final

judgments expressly delivered on the merits of the matter or on which the statute of limitations has run.[FN15]

[FN15] Law 28389, published on November 17, 2004.

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88. In furtherance of the constitutional reform, Law 28449 was published on December 30, 2004, introducing new rules for the pension regime under Decree-Law 20530. The pertinent parts of said Law provide as follows:

Article 3. - Pension cap. The maximum monthly amount for retirement, disability, and survivor's pensions under the pension regime governed by Decree-Law 20530 is two (2) tax units as in force on the date when the pension becomes payable.

Article 4.- Pension adjustments. Equalization of pensions with wages and any income provided for active government employees or officials is forbidden. Pensions shall be adjusted as follows:

a) Pensions received by beneficiaries who are 65 years old or over, whose amount does not exceed the sum of two (2) tax units on each occasion, shall be adjusted at the beginning of each year by executive decree proposed by the Ministry of Economy and Finance and approved by a vote of the Council of Ministers, bearing in mind annual cost-of-living differences and the financial capacity of the State.
b) Pensions received by beneficiaries who are less than 65 years old shall be periodically adjusted taking into account budget estimates and the possibilities of the national economy.

(…)

TRANSITORY PROVISIONS

(…)

THIRD.- Adjustment of pensions to the cap. The cap to which Article 3 of the instant law refers shall be progressively applied upon the entry into force of this law. All pensions in excess of two (2) tax units, as in force upon the promulgation of the instant Law, shall be reduced annually at a rate of 18% until the year in which said pension reaches the respective cap in force.[FN16]

[FN16] Law 28449, published on December 30, 2004.

E. The judgment of Constitutional Court

89. On June 3, 2005, the constitutional court returned a judgment in which it found the reform proposed through Laws 28389 and 28449 to be constitutional. The arguments of the Constitutional Court included the following:

The equalization system provided in the Decree-Law 20530 regime is the basic reason why the disparity between pensions under this regime have been able to grow, turning each pensioner, based on the rule of commutative justice, into a separate unit in the system and dependent on an external factor that is highly advantageous for them but unfair to the rest: the remuneration of the active worker in the position from which the pensioner retired. This equalization could only be maintained in the context of distributive justice as a concrete manifestation of the principle of solidarity, such that a certain quantum of the highest pensions under the regime could increase the lowest ones. Such a course undoubtedly entails a setback for the pensioners who are best off (the minority), but in no sense could it be considered to undermine the principle of progressive realization of rights, since it signifies an improvement those for worst off (the majority).[FN17]

[FN17] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.

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90. In the judgment, the Constitutional Court agreed that the new rules imposed ultimately consolidate the social and democratic rule of law since they:

1. Pave the way it for a significant economic redistribution that eliminates insulting imbalances in pension amounts in a poor state, as is the case in Peru.
2. As a result of the foregoing and pursuant to Law 28449, an element of social justice is introduced: the possibility to increase the basic pension of pensioners under the Decree-Law 20530 regime who receive less than the monthly minimum wage (S/. 415.00), as well as an increase for those who receive a pension of less than S/. 800.00.
3. Accordingly, a progressive realization is proposed in the real exercise of the pension rights of the universe of pensioners under the Decree-Law 20530 regime, and not only a segment thereof, as was the case prior to the reform.
4. The reform makes it possible to deliver the benefits of the pension system to broader sectors.[FN18]

[FN18] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.

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91. The Constitutional Court took into consideration a brief presented by the Office of the President of the Council of Ministers, the Ministry of Labor and Social Advancement, and the Ministry of Economy and Finance, which pointed out that the highest pension under Decree-Law 20530 was 26 times higher than the lowest one. The Court noted that the reform could indeed introduce a measure of equity in the pension regime since in approximately five years this disparity would be reduced from 26 to seven. The Court recalled that in a previous decision it had already indicated that the aforesaid pension regime "is essentially a decapitalized system since, in most cases, the contributions that pensioners have made during their years in service are patently insufficient to finance the benefits they receive."[FN19]

[FN19] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.
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92. The same Court mentioned previous judicial decisions as follows:

Indeed, during 24 years (from July 1979 to July 2003), the rate of contribution to the regime of Law number 20530 was of 6% (it was increased to 13% only recently, as of August 2003,) which is an issue that obviously determines its unfeasibility; even taking into account that in 1982, Law No. 23495 came into force, which developed the Eighth General Disposition and Transitory of the Constitution of 1979, allowing the progressive and unlimited equalization of the pensions with remunerations of the public sector with the respective categories.

According to the information sent by the Ministry of Economy and Finance at request of this Constitutional Court, in regards to the number of high public officials, beneficiaries of Law No. 20530, the revised report `multiannual macroeconomic frame 2004-2006' published in the official newspaper El Peruano (The Peruvian) on August 31, 2003, and to the information of public knowledge provided by the same Ministry, published in www.proyecto20530.gob.pe, 'It is considered that, under optimistic conditions, the value of the contributions to the system between 1964 and 2003 hardly reaches US$ 10.147 millions, in comparison with the US$ 36.950 millions that were paid in the same period. It is esteemed that in the future they will only collect US$ 149 million in contributions whereas they must pay pensions of US$ 24.564.

Due to the reduced amount of the contributions, the pensions of Law 20530 must be financed through public resources from the taxes that all Peruvians pay (…).It is estimated that for a person to obtain a pension equivalent to the 100% of the salary, that can be transferred to widows for life, with thirty years of service, it would be necessary a contribution of at least 38% so that it does not require subsidy of the State. Also the system did not require a minimum age of retirement but only a time period of service and contributions in which the years of study are also included to accede to an equalized pension. Then pensioners have retired to a very early age what tends to extend the period of the payment of pensions'.[FN20]

[FN20] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.
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93. Applying a reasonableness test, the Constitutional Court concluded that the reform "has respected the core content of the fundamental right to a pension (…) in providing for the closure of the pension system under Decree-Law 20530, the introduction of pension caps, and the elimination of pension equalization. The Court also found that the progressive and universal nature of the institutional guarantee of social security was not impaired (…) and that there was no impediment to an increase in the quality of life (…) or observance of the pensioners' rights to equal treatment and property." [FN21]

[FN21] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.
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94. The Constitutional Court also concluded, with respect to matters of form, that the reform was carried out in accordance with Article 206 of the Constitution.[FN22]

[FN22] Constitutional Court of Peru, Proceeding on Constitutionality, Judgment of June 3, 2005.

VI. LEGAL ANALYSIS

95. The facts in the instant case center on the change caused by a constitutional and legal reform to the way in which the alleged victims had been exercising their right to a retirement pension. Under the American Convention, these facts may be analyzed from two perspectives. The first, the incorporation of the proprietary effects of a particular social security system in the concept of private property under Article 21 of the Convention; and the second, within those economic and social rules contained in the OAS Charter whose progressive realization States are duty-bound to bring about pursuant to Article 26 of the Convention.

A. The rights to property (Article 21 of the American Convention)

96. Article 21 of the American Convention states that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

97. Article 1(1) of the Convention stipulates:

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

98. Article 2 of the American Convention provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

99. The Commission will analyze if the constitutional and legal reform constituted a violation of the right to private property of the alleged victims, in the following order: i) General aspects

on the protection of the right to a pension under article 21 of the Convention; II) Permissible restrictions to the patrimonial effects of the right to a pension; and III) The application of the test to the instant case.

1. General considerations on protection of the right to a pension under Article 21 of the Convention

100. In the Five Pensioners case, which also concerned a group of retirees who belonged to the Decree-Law 20530 regime, both the Commission in its application, and the Inter-American Court in its judgment, found that insofar as the Peruvian Constitution in force at the time of the facts in the case recognized pension rights as "acquired rights", the proprietary effects of the right to a pension, including equalization, had become part of the property of the victims when the latter began to pay contributions and meet the necessary legal requirements. Accordingly, they were protected by Article 21 of the Convention.[FN23]

[FN23] IACHR, Application in the case of Torres Benvenuto et al. Five Pensioners" (Case 12.034) v. The Republic of Peru, December 4, 2001, paras. 114 and 115; I/A Court H.R., Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98. paras. 102 – 104. See also IACHR, Report on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4, September 7, 2007, paras. 126-128.

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101. For its part, the European Court has found that the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed.[FN24] The Court has also held that the rights arising from the payment of social security contributions are pecuniary rights for the purposes of Article 1 of Protocol No. 1 to the European Convention,[FN25] which recognizes the right to property in similar terms to Article 21 of the American Convention. In a more detailed manner, the European Court has established that the right to a pension to which a person has made contributions, constitutes a rights to property protected under that article[FN26].

[FN24] ECHR. Bellet, Huertas and Vialatte v. France (dec.), nos. 40832/98, 40833/98 and 40906/98, 27 April 1999, and Skorkiewicz v. Poland (dec.), no. 39860/98, 1 June 1999.
[FN25] ECHR. Gaygusuz v. Austria, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1142, §§ 39-41. See also: ECHR. Case Willis v. United Kingdom. Communication No. 36042-97. Judgement of June 11, 2002, paras. 32-36.
[FN26] ECHR. Azinas v. Chipre, Communication No. 56679/100, judgement of June 20, 2002. Para 32 – 34.

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102. The European Court has also ruled that if a state has in force legislation providing for the payment as of right of a welfare benefit, that legislation could be regarded as generating a proprietary interest for persons satisfying its requirements. In the opinion of the European Court

that proprietary interest could fall within the ambit of Article 1 of Protocol No. 1 to the European Convention.[FN27]

[FN27] ECHR. Stec and others v. United Kingdom. Nos 65731/01 and 65900/01. Decision as to admissibility. Para. 54.

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103. The Commission, therefore, concludes that the proprietary effects of a pension regime to which persons have made contributions or met the respective legal requirements should be understood as falling within the scope of the right to property enshrined in Article 21 of the American Convention. Accordingly, generally speaking and without prejudice to the assessment on restrictions made below, due to the incorporation in the internal law of a specific mechanism to establish the amount of the pension, the pensions and their corresponding equalization became part of the property of the alleged victim.

2. Permissible restrictions to the patrimonial effects of the right to a pension

104. Whenever the exercise of a right is alleged to have been restricted, the interpreters of the Convention must determine, first, if the nature of the right is such that it is susceptible to restriction. However, this does not mean that any restriction is acceptable under the American Convention, in particular under the standards set forth in Article 30 of the Convention and, as appropriate, the specific criteria contained in the provisions that recognize the right, to wit, Article 21 of said instrument.[FN28] It should be noted, that in cases involving restrictions of rights, the onus of demonstrating the legitimacy of the restriction rests, in principle, on the State.

[FN28] In examining cases concerning restrictions on rights, the Inter-American Court has analyzed each restriction in the light of Article 30 of the American Convention and of the specific rule that recognizes the right. See, for example, I/A Court H.R., Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, par. 117.

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105. Article 30 of the Convention provides that "[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established".

106. As the text of the American Convention suggests, the right to property is not an absolute right since its use and enjoyment may be subordinated to a social interest.[FN29] As to permissible restrictions, the Inter-American Court has found that the right to property must be understood within the context of a democratic society where in order for the public welfare and the collective rights to prevail there must be proportional measures that guarantee individual rights.[FN30] To cite the Court, "[t]he social role of the property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, can limit or restrict the right to property, always respecting the

cases contained in Article 21 of the Convention and the general principles of international law."[FN31]

[FN29] I/A Court H.R., Case of Salvador Chiriboga. Judgment of May 6, 2008. Series C No. 179, par. 61; I/A Court H.R., Case of Chaparro Álvarez and Lapo Íñiguez. Judgment of November 21, 2007. Series C No. 170, par. 174.
[FN30] I/A Court H.R., Case of Salvador Chiriboga. Judgment of May 6, 2008. Series C No. 179, para. 60.
[FN31] I/A Court H.R., Case of Salvador Chiriboga. Judgment of May 6, 2008. Series C No. 179, para. 60.

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107. On the concept of social interest in article 21 of the American Convention, the Court has indicated that "comprise all those legally protected interests that, for the use assigned to them, allow a better development of the democratic society. To such end, the States must consider all the means possible to affect as little as possible other rights and therefore, undertake the underlying obligations in accordance with the Convention." [FN32]

[FN32] I/A Court H.R., Case of Salvador Chiriboga. Judgment of May 6, 2008. Series C No. 179, par.a 73.

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108. Specifically in the Five Pensioners Case, the Court insisted that States can restrict the enjoyment of the right to property for reasons of public utility or social interest. The Court also stated that the patrimonial effects of pensions (the pension amount), States may reduce these only by the appropriate legal procedure and for the said reasons."[FN33]

[FN33] I/A Court H.R., Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 116.

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109. In the same case, the Court based its interpretation on Article 5 of the Protocol of San Salvador and held that states were only allowed to establish restrictions and limitations on the enjoyment and exercise of economic, social and cultural rights "by means of laws promulgated in order to preserve the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."[FN34] The Court also noted that in any case, if the restriction affects the right to property, this should also be established in accordance with the parameters established in Article 21 of the American Convention.

[FN34] I/A Court H.R., Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 116.

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110. In similar fashion, the European Court has suggested that the right to a pension is not an absolute right and that its inclusion in Article 1 of Protocol No. 1 cannot be interpreted as entitling a person to a pension of a particular amount.[FN35]

[FN35] ECHR. Kjartan Ásmundsson v. Iceland. No. 60669/00. Final Decision. March 30, 2005, para. 44, citing Müller v. Austria, no. 5849/72, Commission's report of 1 October 1975, Decisions and Reports 3, p. 25.

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111. In cases related to reductions of pension amounts, the European Court has considered several criteria to determine the existence of a violation of the right to property. Besides analyzing the legitimacy of the objective that it is tried to obtain with the restriction, it has indicated that an exam on the proportionality also corresponds, that is to say, if the State realized a right balance between the demands of the general interest of the community and the requirements of the protection of individual rights[FN36]. In the mentioned exam, the Court has focused in the determination whether the restriction affected the essence of the right to the pension[FN37].

[FN36] ECHR. Kjartan Ásmundsson v. Iceland. Communication No. 60669/00. Final Decision. March 30, 2005. Para. 40.
[FN37] ECHR. Kjartan Ásmundsson v. Iceland. . Communication No. 60669/00. Final Decision. March 30, 2005. Para. 39. Citing: Domalewski v. Poland (dec.), Communication No. 34610/97, ECHR 1999-V.

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112. On the basis of these general criteria, the Commission will evaluate if the constitutional and legal reform object of analysis in the present case, constituted an arbitrary interference in the right to property of the alleged victims, from the following test: i) If the restriction was imposed through a law; ii) If the restriction responded to a legitimate aim to raise a social interest or to preserve the general well-being in a democratic society; and iii) If the restriction were proportional in the sense of being reasonable to obtain this aim and, in any case, of not sacrificing the essence of the right to a pension.

3. Application of the test to the instant case

a. Lawfulness

113. In the instant case, the restriction on the right to a pension was imposed through a constitutional and legal reform introduced by Laws 28389 and 28449. The information available indicates that the laws were passed in accordance with the constitutional system in force. In particular, the Commission has no evidence in its possession that would lead it to a different conclusion to that reached by the Constitutional Court to the effect that Law 28389, which

ushered in the constitutional reform, was adopted in accordance with Article 206 of the Constitution. In the unconstitutionality action brought by the petitioners, the Peruvian Constitutional Court ruled on the compliance by theses laws with formal requirements and concluded that the appropriate procedures had been fulfilled. In such circumstances, the Commission finds that the restriction met the requirement of lawfulness.

b. Legitimate aim

114. The Peruvian state argued that the constitutional and legal reform was necessary because the contributions governed by Decree-Law 20530 were not sufficient to cover the cost of the pensions under the regime. In that connection, the State drew attention to the fact that the continued payment of the pensions posed a threat to the financial stability of the state.

115. The State also put forward a series of reasons why the pension regime established by Decree-Law 20530 should be changed. Those reasons include: i) the excessive cost of the regime; ii) its unpredictability because there was no minimum age requirement for drawing a pension, the only condition being length of service; and, iii) inequity, given that the regime favored a privileged group of pensioners. On this last point, the State noted that 73% of pensioners under the Decree-Law 20530 regime received a pension higher than the maximum amount received by the majority of pensioners in the Peruvian public sector, who were under the Decree-Law 19990 system. The Commission notes that the Constitutional Court's ruling of June 3, 2005, cited a report of the Council of Ministers' Presidency, the Ministry of Labor and Social Protection and the Ministry of Economy and Finances, which indicated that the highest pension of the Decree-Law 20530 is 26 times higher than the lowest.

116. The Commission considers that maintaining the financial stability of the state as well as ensuring that the whole social security system is founded on principles of equity amount to legitimate aims to be pursued by the State in a democratic society.[FN38] In particular, the Commission finds that the real possibilities of accessing a social security system on an equal footing are directly linked to the principle of progressive realization of rights which must guide all state actions in the area of economic, social and cultural rights.

[FN38] The European Court has ruled that the elimination of privileged social security systems can constitute a legitimate aim in restricting the right to property. See ECHR. Stanislaw Domalewski v. Poland. No. 34610/97. Decision as to Admissibility. Also, it has ruled as legitimate that changes in pension rights take into account the need of the persons entitled to the pension. It also stated as legitimate the need to solve financial obstacles of a pension fund. ECHR. Kjartan Ásmundsson v. Iceland. Communication No. 60669/00. Final Decision. March 30, 2005. Paras. 42 and 43.

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117. Therefore, the IACHR considers that the constitutional and legal reform had a legitimate aim.

c. Proportionality

118. The IACHR must determine if the restrictive measure was proportional to the aim pursued, of if it affected the essence of the right to a pension. This analysis must take in special consideration the amount of the contributions that the law imposed to the supposed victims while were active workers.

119. Based on the established facts, the Commission notes that the constitutional and legal reform alleged to be incompatible with the Convention had several elements. On one hand, it eliminated the pension regime under Decree-Law 20530, the most salient feature of which was equalization of pensions with the wages earned by active employees. On the other hand, the reform introduced caps on pensions, in the figure of tax units; under the reform no pensioner could receive more than two tax units.[FN39] The reform also established alternative mechanisms for periodically adjusting pensions and bringing high pensions into line with the cap.

[FN39] According to official figures provided by the Peruvian tax authority, as of 2009, two tax units correspond to 7,100 nuevos soles, an amount approximately equivalent to US$2,200. Information available on February 19, 2009 at http://www.sunat.gob.pe/indicadores/uit.htm.

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120. In general terms, the Commission considers reasonable the argument that these measures can generate a considerable saving and, therefore, are suitable to achieve the persecuted aim that, as it was indicated in the previous section, is to assure the financial stability of the State and to eliminate the inequity in the social security system by increasing the lowest pensions among other aspects.

121. Regarding the impact of the reform and whether it affected the essence of the restricted right, bearing in mind the different aspects of the reform, it is necessary to take into account that the impact was not the same for all pensioners under the Decree-Law 20530 scheme. Indeed, the only effect on pensioners who receive less than two tax units was a change in the adjustment mechanism. Pensioners who received more than that amount felt the added effect of a gradual reduction of their pensions until they were level with the cap.

122. The Commission underlines that those differences in terms of impact emerged from an analysis in abstracto of the reform since the petitioners provided no information on the specific effects on each of these groups of presumed victims.

123. The Commission believes that the impact of a restriction on the right to a pension should not necessarily be measured in precise amounts. However, in the instant case the IACHR does not even have figures on, for instance, the percentages in the pension reductions or the cuts in pensions received by each group of pensioners as a result of the application of the new pension adjustment system.

124. In that sense, an analysis in abstracto of the norm permits the conclusion that pensioners who used to belong to the Decree-Law 20530 regime continue to receive a retirement pension.

Although the reform may have had the effect of reducing some amounts, whether through adjustment in line with the pension caps or implementation of a less favorable periodic adjustment mechanism, it was not shown in the instant case that the reduction had affected the essence of the right to receive a pension,[FN40] or that it was in open contradiction to the contributions made by the victims while they were in service. On the contrary, as the Constitutional Court concluded in its sentence of June 3, 2005, during 24 years, between 1979 and 2003, the alleged victims carried out contributions of 6% of their monthly wage, without having carried out additional or special contributions to obtain the benefits of automatic and progressive equalization. As supra indicated in paragraph 92, according to a series of reports presented to the Constitutional Court, to finance without subsidy of the State the benefits of Law 20530, a contribution equivalent to 38% of the monthly wage in activity would have been required.

[FN40] The European Court of Human Rights made a similar assessment when it found that the total deprivation of a pension constituted a disproportionate burden for the applicant. The Court noted that it would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction. See ECHR. Kjartan Ásmundsson v. Iceland. No. 60669/00. Final Decision, March 30, 2005, para. 45. In another case, the European Court concluded that the elimination of a "veteran benefit" under a Social Security system did not constitute a violation of the right to property in that it did not impair the essence of the applicant's pension rights. See Stanislaw Domalewski v. Poland. No. 34610/97. Decision as to Admissibility.

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125. Based on the available information, the Commission considers that the restriction imposed to the right to the pension of the alleged victims, was proportional because it constituted a suitable mechanism to achieve the proposed aim, it did not affect the essential content of the right nor did it ignored the contributions made by the pensioners.

126. The Commission deems it pertinent to clarify that although the right to a pension was restricted by the constitutional reform, that restriction did not amount to a deprivation of the right to property for the purposes of Article 21(2) of the Convention. On the contrary, as was noted, the alleged victims continued to exercise their proprietary rights over their pensions and did not, based on the information submitted, suffer an impairment to the essence of that right. Accordingly, the Commission finds that restrictions of this type are not tantamount to expropriation,[FN41] which requires compensation under the terms of the American Convention.

[FN41] In this connection, the European Court has held that expropriation does not exist when the prerogatives arising from the right to property of preserved. ECHR, Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, Series A Nº 52, pp. 24 para. 62.

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127. By virtue of the above considerations, the IACHR concludes that the Peruvian State did not incur in violation of the right to private property nor of the obligations enshrined in articles 1.1 and 2 of the said instrument.

B. Progressive development of economic, social and cultural rights (Article 26 of the American Convention)

128. Article 26 of the American Convention provides:

"The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

129. The analysis of the presumed violation of this norm through the constitutional and legal reform, will be done in the following order: i) General aspects on the protection of the right to a pension under Article 26 of the Convention; ii) The progressive development and the prohibition of regression; and iii) The application of this prohibition to the instant case.

1. General aspects on the protection of the right to a pension under Article 26 of the Convention

130. The right to a pension, as an integral part of the right to social security, also comes within the scope of Article 26 of the American Convention, which refers to the economic, social, educational, scientific, and cultural standards set forth in the Charter of the OAS. Article 45 of the Charter includes the right to social security in the following terms:

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

(…)
b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
(…)
h) Development of an efficient social security policy.

131. For its part, the Inter-American Court has found that "the [American] Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration."[FN42]

[FN42] I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 43.

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132. The American Declaration of the Rights and Duties of Man, recognizes the right to social security at Article XVI as follows:

Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

133. Thus, the Commission concludes that the right to social security constitutes one of the economic and social standards mentioned in Article 26 of the American Convention and, therefore, states parties are under the obligation to seek the progressive development of that right.

2. The progressive development and the prohibition of regression

134. Article 26 of the Convention establishes the obligation that any measures adopted in the area of the economic, social, and cultural rights covered in that provision tend toward their progressive development. The Protocol of San Salvador may also be relied on to interpret Article 26 of the American Convention and determine the scope of the State's obligation under said provision.[FN43] Article 1 of the Protocol provides that state parties undertake to adopt the necessary measures, to the extent allowed by their available resources and taking into account their degree of development, for the purpose of achieving progressively the full observance of the rights recognized in the Protocol.

[FN43] Ratified by Peru on June 4, 1995, the Protocol came into force on November 16, 1999.

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135. For its part, the International Covenant on Economic, Social and Cultural Rights contains at Article 2(1) similar provisions to Article 26 of the American Convention and Article 1 of the Protocol of San Salvador,[FN44] in the following terms:
Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[FN44] Peru ratified the Covenant on April 28, 1978.

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136. The Committee on Economic, Social and Cultural Rights has explained the obligation of states to adopt measures to the maximum of their available resources with a view to achieving progressively the full realization of economic, social and cultural rights. In that regard, the Committee observed that:

The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[FN45]

[FN45] Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991).

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137. In the same General Observation, the Committee concluded that “any deliberately regressive measure on the matter will require the most careful consideration and will have to be justified by reference to the totality of the rights enshrined in the Pact and the context of the total advantage of the maximum of the resources available” [FN46]. Additionally, and referring to other rights enshrined in the PIDESC, this Committee it established the existence of a strong presumption of non permissibility of the regressive measures as well as an absolute prohibition of backward nature when the measurement affects the satisfaction of the essential levels of the rights at issue[FN47].

[FN46] Economic, Social and Cultural Rights Committee. General Comment 3. The nature of States parties obligations Adopted in the Fifth Period of Sessions. 1990, E/1991/23.

[FN47] Economic, Social and Cultural Rights Committee. General Comment 14: The right to the highest attainable standard of health; General Comment 15: The right to water; and General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

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138. The concept of progressive realization was developed by the Inter-American Court, citing the Committee on Economic, Social and Cultural Rights as follows:

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 has 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.[FN48]

[FN48] I/A Court H.R., Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, par. 147. citing Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), point 9.

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139. From the previous criteria results that the nature of the obligations derived from article 26 of the American Convention means that total effectiveness of such rights must be achieved progressively and in attention to the available resources. This means a correlative obligation not to back down in the advances achieved in this matter. That is the non regressive obligation developed by other international organisms and understood by the IACHR as a State obligation which compliance can be analyzed by the Commission through the individual petition system enshrined in the Convention.

140. The Commission considers of special relevance to clarify that the restriction in the exercise of a right, is not necessary a regressive measure. The Inter-American corpus iuris in the matter of economic, social and cultural rights, evidence that the concept of progressiveness - and the correlative obligation of non regressive - established in article 26 of the American Convention, does not exclude the possibility that a State imposes certain restrictions to the exercise of the rights enshrined in that norm. The obligation of non regressive measures implies a joint analysis of the individual affectation in relation to the collective implication of the measure. In that sense, not every regressive measure is incompatible with article 26 of the American Convention.

3. The application of this prohibition to the instant case

141. By virtue of the above, the Commission must analyze if the constitutional reform constituted a regression and, if so, determine if it was justified by strong reasons that make the regression compatible with article 26 of the American Convention. As indicated above, the reform contains different elements which due to their nature, require a separate consideration.

142. In the first place, the reform suppressed the equalization of the pensions in regards to the salary earned by active workers. Even though the measure could have reduced the amounts received by pensioners, the result was clearly regressive for two reasons. First of all, the majority of pensioners in the public sector did not enjoy the benefit and, in that sense, the pensioners

affected are not representative of the development stage of the right to social security in Peru. On the contrary, being a closed system, it is reasonable to consider that the equalization itself constituted a privilege which for its high cost rendered difficult the progressive improvement of the conditions of pensioners who were not beneficiaries of the equalization.

143. In the second place, the disputed norms set an upper limit to the pensions under the concept of the Unidades Impositivas Tributarias. According to the reform, any pensioner can earn more than two Unidades Impositivas Tributarias[FN49]. In order to achieve that amount, the reform established a progressive reduction of the amount earned, indicating that under any circumstance the reductions can go beyond the upper limit of two Unidades Impositivas Tributarias. The Commission considers that setting upper limits to pensions does not constitute itself a regressive measure, unless that limit is manifestly incompatible with the essential content of the right. In this case, the official authorities established the amount of the upper limit according to the economic situation of the country and the cost of living. The Commission has no elements to consider that the upper limit of two Unidades Impositivas Tributarias is unreasonable or suppressed the essence of the right to pension. On the contrary, the Unidad Impositiva Tributaria increases periodically and the Commission does not have any detailed information that these adjustments do not satisfy the progressive increase of the cost of living. In conclusion, the Commission finds that the reduction affected a reduced number of pensioners with the aim of improving the conditions of the exercise of the right by the rest of the beneficiaries. Thus this part of the reform did not constitute a regression as prohibited by article 26 of the Convention.

[FN49] According to official figures provided by the Peruvian tax authority, as of 2009, two tax units correspond to 7,100 nuevos soles, an amount approximately equivalent to US$2,200. Information available on February 19, 2009 at http://www.sunat.gob.pe/indicadores/uit.htm

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144. In the third place, and as a mechanism to maintain the purchasing power of pensions despite the suppression of the equalization, the reform established that pensioners over 65 years old earning less that two Unidades Impositivas Tributarias – the upper limit – will have as a readjustment mechanism, an increase according to the consumer price index. The Commission already concluded that the suppression of the equalization did not constitute itself a regressive measure. The Commission does not have specific elements to consider that the new mechanism is not suitable for maintaining the pensions' purchasing power. The fact that it is less favorable for a group of pensioners, cannot characterize a measure as a regression of the stage of development in the right to pensions especially if, as stated above, the aim of those measures is to ensure the feasibility of the system in the future and to remove the inequality within the system.

145. Finally, the reform established that for pensioners under 65 years old earning a pension under two Unidades Impositivas Tributarias, the periodic adjustment must be done in accordance with the state of the economy. The Commission considers that, in principle, suppressing the periodic and mandatory adjustment safeguard, and replacing it with an eventual readjustment left to the State's discretion, can constitute a regressive measure. Nonetheless, the Commission notes

the Constitutional Court's decision of June 3, 2005, which declared the norm constitutional but restricted its interpretation as follows: " that the financial sustainability of the State is a criteria to be considered when periodically readjusting pensions of pensioners under 65 years old, is not an obstacle for the readjustment itself. It is merely a factor conditioning the quantum of the readjustment and not the mandatory character of its periodic realization, which cannot be extended for unreasonable periods of time (…) This Tribunal will continue to give its attention to the regular occurrence of the readjustment as interpreted, that is, as a real obligation and not as an arbitrary faculty which would result in further interpretations of the norm as unconstitutional and possibly lead to further sanctions" [FN50].

[FN50] Constitutional Court of Peru. Constitutional Procedure. Decision of June 3, 2005.
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146. The Commission finds the Constitutional Court's interpretation to be reasonable and that the norm itself does not constitute a regression incompatible with article 26 of the American Convention. In any case, the application of this norm could continue to be supervised by the Constitutional Court by virtue of the subsidiarity principle.

147. By virtue of the above considerations, the Commission does not have sufficient elements to conclude that the reform constituted a regressive measure of the development of the right to social security in Peru and therefore concludes that there is no breach to article 26 of the American Convention.

C. Right to judicial protection (Article 25 of the American Convention)

148. Article 25 of the American Convention provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:

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

149. As has been shown, the petitioners filed an action for unconstitutionality against Laws 28389 and 28448, which the Constitutional Court decided in a judgment dated June 3, 2005, ruling that the laws were constitutional. The petitioners put forward no submissions regarding alleged violation of fair trial guarantees in the proceeding before the Constitutional Court or on lack of access to an effective remedy for presenting their complaint. The arguments of the petitioners were confined to questioning the legal position adopted by the aforesaid Court. In that connection, the Commission reiterates that the fact that a judicial outcome is unfavorable does

not constitute a violation of the right to an effective remedy. Furthermore, there is nothing in the evidence in the record to suggest the existence of manifest judicial arbitrariness. Therefore, the Commission concludes that the Peruvian State did not violate the right recognized in Article 25 of the American Convention.

VII. CONCLUSIONS

150. Based on the factual and legal considerations given above, the Commission concludes that the petition is admissible and that the Peruvian state did not violate the rights recognized in Articles 21, 26 and 25 of the American Convention, or the obligations contained in Articles 1(1) and 2 of that treaty. The Commission further concludes that the petition is inadmissible as regards the alleged violation of rights enshrined in Articles 4, 10, 17, and 24 of the American Convention.

Done and signed in the city of Washington, D.C., on the 27th day of the month of March, 2009. (Signed): Luz Patricia Mejía Guerrero , President; Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo G. Carozza Commissioners. On March 27, 2009 Commissioner Paolo Carozza announced that he would write a concurring opinion, which was presented in writing on April 27, 2009 in accordance with article 19 of the Rules of Procedure of the IACHR. This vote is included at the end of the present report.

CONCURRING OPINION OF COMMISSIONER PAOLO CAROZZA

1. I concur with the results of the present report of the Commission on the admissibility and merits of the case of National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru, in which the Commission concludes, inter alia, that the pension reform implemented by Peru does not violate Articles 21, 25, and 26, or the obligations of Articles 1(1) and 2, of the American Convention on Human Rights (the "Convention"). However, I consider certain aspects of the Commission's legal analysis in relation to Articles 21 and 26 unsatisfactory and therefore write separately to suggest a number of points that may be relevant to future cases.

I. Article 21

2. The test articulated by the majority's report for determining whether a given restriction to property rights is permissible under Article 21, while cogent in theory, was unnecessarily applied in this case. The report reasons that, "due to the incorporation in the internal law of a specific mechanism to establish the amount of the pensions, the pensions and their corresponding equalization became part of the property of the alleged victim" (Para. 103). By treating equalization as property protected by Article 21 notwithstanding subsequent changes in domestic law that discontinued that right, the Commission has effectively declared that once recognized by the State, a property right is henceforth protected by international law even if the domestic law that created the property right is changed and no longer exists. Instead, it should have concluded that equalization is protected as a property right under Article 21 only insofar as it is recognized as such under domestic law.

3. The word "property" in the Convention has both an autonomous meaning and a meaning tied to the domestic law of the state in question. On the one hand, there is a certain meaning to the term "property" and thus a certain content to Article 21 which pursuant to the Convention must be recognized and protected by the signatory States. So, for instance, a State could not abolish all private property simply by reforming its domestic law to define "property" in a way that only refers to collective ownership. On the other hand, however, domestic law may go beyond what the American Convention independently establishes and create certain additional property rights not prescribed by the Convention, thus adding to a person's patrimony by recognizing rights beyond those required by international standards to be included within the meaning of "property." Where domestic law does so, those rights are then protected by the Convention – thus as long as they exist they are subject to the Convention's standards for legitimate interference in the rights, to requirements of nondiscrimination, and to judicial guarantees, for example. This is the approach recognized by the Inter-American Court of Human Rights in the case of Five Pensioners v. Peru.[FN51]

[FN51] See I/A Court H.R., Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98 para. 93-121.

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4. There is nothing exceptional about property in this respect. In other ways – for example, most notably in Article 8(1) and Article 25 the Convention recognizes that certain rights established under domestic law thereafter receive protections by international human rights law. In these ways, the Convention creates a "floor" of rights protections but not a "ceiling" – contracting States are free to go beyond the rights protections of the Convention. This is also confirmed in general by Article 29(b) of the Convention.

5. However, just as recognition of such additional property rights that go beyond the Convention's minimum autonomous meaning is within the discretion of the States, so too is their removal. Article 21 contains no requirement of "progressivity" or "acquired rights" by which property rights once created under domestic law may not be thereafter abrogated. Nothing in the Five Pensioners or other jurisprudence of the Inter-American system suggests otherwise.

6. Accordingly, in this case it is necessary to establish first whether the right to indexation of the pensions is a right protected by the autonomous content of the word "property" in the Convention, or whether it is protected only insofar as it is a property right created and recognized as such under domestic law. In the Five Pensioners case, the Inter-American Court notes that "Article 21 of the Convention protects the right of the five pensioners to receive an equalized retirement pension in accordance with Decree Law No. 20530, in the sense that it is an acquired right, by virtue of the provisions of the Peruvian Constitution,"[FN52] as the majority of the Commission also notes in Paragraph 100 of its report in the present case. Moreover, nothing in general international law or in the comparative practice of the contracting States of the Convention suggests that equalization of pension amounts can be considered anything but a specific domestic practice of Peru in a given period. Few if any other states of the region recognize such a property right, now or in the past, and no international treaty or international jurisprudence regards it as necessary to the protection of the right to property. Thus the

Convention protects the holders of these rights in Peru from unreasonable interference, limitation, discrimination, and so on, only insofar as the threshold condition is met, namely that domestic law has created and maintains the existence of the right.

[FN52] Id. at para. 102 (emphasis added).

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7. In sum, because equalization is not a required component of property rights under international law, the Peruvian State was entirely free, within its discretion, to discontinue that right through the appropriate processes of its domestic constitutional system. That is exactly what the State of Peru did, as confirmed by its Constitutional Court. Therefore, with the constitutional reform and subsequent statutory reform, equalization ceased to be a property right recognized by domestic law or protected by the Convention. Thus the rest of the majority's Article 21 analysis was entirely superfluous.

II. Article 26

8. The majority's discussion of Article 26 is unsatisfactory because it does not provide a clear indication of the standard by which the Commission will, in future cases, review whether a policy measure is regressive and in violation of Article 26 of the Convention. Moreover, to the extent that the Commission does give indications of a possible test for measuring the permissibility of such measures, it is not clear that the standard suggested would avoid having the Commission assume a degree of economic and political analysis and review of highly complex policy decisions that is significantly beyond our institutional competence.

9. First of all, the majority's report assesses regressivity by evaluating whether the measure in question affects the "essence" of the right: "The Commission considers that setting upper limits to pensions does not constitute itself a regressive measure, unless that limit is manifestly incompatible with the essential content of the right. In the instant case . . . [t]he Commission has no elements to consider that the upper limit of two Unidades Impositivas Tributarias is unreasonable or suppressed the essence of the right to pension" (Para. 143, emphasis added). Elsewhere the report of the majority also refers to an absolute prohibition on regressive measures that affect the "essence" of the right at issue (Para. 137).[FN53] The analysis of human rights according to their "essence" is a conceptual framework that originally derives, in all probability, from the German Constitution, and from there it was imported into several other constitutional systems.[FN54] It is recognized, however, as being a highly controversial idea in practice, because of the very broad disagreement and uncertainty about how the "essence" of a right could be determined and applied. For that reason, the German Constitutional Court itself has generally avoided relying on the "essence" of rights to decide cases.[FN55] We have no reason to import this problematic concept into Inter-American jurisprudence and should avoid its attendant difficulties. In any event, in this case the Commission has also established the non-regressive character of the reform without reference to the "essence" of the right (Para. 142), thus this language is simply unnecessary.

[FN53] Citing Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991)).
[FN54] See David P. Currie, The Constitution of the Federal Republic of Germany 178 (Univ. of Chicago Press) (1994). See also the discussion of this point by the South African Constitutional Court in State v. Makwanyane 1995 (3) S.A. 391 (CC) at para. 132 (S. Afr.)).
[FN55] See id.
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10. Second, the majority's report seems to make a confusing association between "permissible restriction" and "regression," stating that "not every regressive measure is incompatible with Article 26 of the American Convention" (Para. 140). Later the report speaks in terms of "justified" regressions (Para. 141). This is a problematic way of reading the Convention because while Article 26 requires progressivity, it does not speak of permissible regressions or conditional progression. What the majority seems to be attempting to express should be more accurately and precisely stated as "not every restriction on the exercise of a right should be considered a regressive measure within the meaning of Article 26." This would be correct, because the measurement of regressivity has an unavoidably (though not necessarily exclusively) collective dimension. Thus a restriction on the exercise of preexisting pension rights by some persons could be entirely compatible with the requirement of progressivity as measured by reference to its collective aspects, as is the case here. This is the point that the majority's report correctly makes in paragraph 142. This finding of non-regressivity should be sufficient to end the inquiry, without any further need to discuss "permissible" or "justified" regression.

11. The majority's report instead goes on to employ this unnecessary confusion between "restriction" and "regression" by indicating that when a measure is found to be regressive the Commission should then analyze whether such a regression is "justified by strong reasons" (Para. 141). This is an unclear and potentially very inappropriate standard of review of the States' social and economic policies. In undertaking the complex balancing and reconciling of the vast array of competing societal interests, resources, and needs that is inherent in the progressive realization of economic, social, and cultural rights, States can reasonably adopt a wide variety of different solutions that are compatible with human rights protection. In this context, it is important for international tribunals to avoid going beyond their competence and substituting their own judgment for that of domestic political actors who are normally better situated to make such decisions, and who are generally (in democratic systems) more accountable to their people as to how they do so. An international body like the Commission, in recognition of the principle of subsidiarity, should be seen as singularly unsuited to making a detailed review and revision of such social choices.

12. Accordingly, a clearer and more appropriate test as to whether a measure ought to be considered "regressive" would seek to determine merely that the measure in question has a rational relationship to the State's efforts to develop progressively the collective economic and social conditions of the country. That is, the standard should ask (a) whether the State was pursuing a legitimate aim reasonably related to the country's economic and social progress, and (b) whether the means chosen were, in good faith, reasonably directed toward that aim. Such a

test enables the Commission to fulfill its role of protecting against arbitrary regressions while avoiding second-guessing the State's reasonable, even if contestable, policy judgments.