

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 135/09; Petition 291-05
Session: Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause: Jaime Salinas Sedo, Jose Pastor Vives, Luis Soriano Morgan, Victor Ernesto Obando Salas, Manuel Obando Salas, Jorge Noblecilla Merino, Cesar Martinez Uribe Restrepo, Victor Granda Guzman, Jaime Gutierrez Tovar, Jose Montero Mendez, Wilder Sanchez Gambini, Enrique Aguilar del Alcazar, Marco Zarate Rotta, Eduardo Solano Pimentel, Pedro Tello Delgado, Jose Chavez Begazo, Luis Ruiz y Urquizo, Cesar Rosado Cisneros, Carlos Galdos Chacon, Cesar Carceres Haro, Hugo Ormeno Huapaya, Feliz Castro Gomez de la Torre and Federico Malaga Rubira v. Peru
Doc. Type: Decision
Decided by: President: Luz Patricia Mejia Guerrero;
First Vice President: Victor Abramovich;
Second Vice President: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paolo G. Carozza.
Dated: 12 November 2009
Citation: Salinas Sedo v. Peru, Petition 291-05, Inter-Am. C.H.R., Report No. 135/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by: APPLICANT: Luis F. Jimenez
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I. SUMMARY

1. On March 1, 2005 the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission," "the Commission," or "the IACHR") received a petition lodged by Jaime Salinas Sedó and Luis F. Jiménez (hereinafter also "the petitioners") on behalf of Jaime Salinas Sedó, José Pastor Vives, Luis Soriano Morgan, Víctor Ernesto Obando Salas, Manuel Obando Salas, Jorge Noblecilla Merino, César Martínez Uribe Restrepo, Víctor Granda Guzmán, Jaime Gutierrez Tovar, José Montero Méndez, Wilder Sánchez Gambini, Enrique Aguilar del Alcázar, Marco Zárate Rotta, Eduardo Solano Pimentel, Pedro Tello Delgado, José Chávez Begazo, Luis Ruiz y Urquizo, César Rosado Cisneros, Carlos Galdos Chacón, César Cárceres Haro, Hugo Ormeño Huapaya, Félix Castro Gómez de la Torre, and Federico Málaga Rubira (hereinafter also "the alleged victims").

2. The petitioners claimed that the Republic of Peru (hereinafter also "Peru," "the State," or "the Peruvian State") had violated the rights enshrined in Articles 1, 5, 8, 10, and 25 of the American Convention by not providing certain compensatory measures for the aforementioned officers of the Peruvian Army, who participated in an attempt to reestablish constitutional rule on November 13, 1992. The petitioners also claimed that the State violated the right established in

Article 24 of the American Convention by not conferring promotion on some of the alleged victims, even though this entitlement had been established in Act 28472 of March 14, 2005. Said law was enacted to confer various entitlements on the officers who participated in the events of November 13, 1992, one of which was to have their time in forced retirement or on inactive status credited for the purpose of pensions and promotions. The petitioners claimed that the Constitutional Court struck down the entitlement to promotion for the officers who occupied or would occupy the grade of general or higher. They stated that this interpretation represents an arbitrary difference in treatment, particularly since other military and civil servants had achieved promotion within their career paths by means of court judgments, executive decrees, and laws similar to Act 28472.

3. The instant petition is closely related to Case 11.084, which has already been decided and published by the IACHR and is currently at the compliance supervision stage. On November 30, 1994, in accordance with Article 51(3) of the American Convention, the IACHR published Report 27/94 on Case 11.084. The report found violation of the rights established in Articles 5, 7, 8, 15, 24, and 25 of the American Convention with respect to 23 members of the Peruvian Army and one civilian who had held a meeting on November 13, 1992 to discuss the viability of overthrowing the de facto government then in power in Peru and reestablishing constitutional rule. The IACHR concluded that these individuals were arbitrarily and unlawfully detained and that a number of them had been subjected to torture and cruel and degrading treatment. It also recommended the State to render without effect the conviction of the 23 officers and to release those still held in prison.[FN1]

[FN1] During the course of compliance supervision for these recommendations, the IACHR was informed of the promulgation of a series of laws and administrative decisions intended to benefit the officers who participated in the events of November 13, 1992. These provided, inter alia, for the compensation of officers subjected to forced retirement or placed on inactive status and for the restoration of certain rights, including contributions to the pension fund, payment of benefits owed, and reinstatement for active duty of officers meeting the age and time-in-service requirements.

4. In its response, the State argued that the officers covered by Act 28472 were benefited from a Constitutional Court ruling and Ministry of Defense decisions awarding them a series of compensations and promotion to the next higher grade. However, the promotion provision could not be enforced for officers who would occupy or already occupied the grade of general, because Article 172 of the Peruvian Constitution gives the President of the Republic exclusive authority to appoint officers in this grade.

5. After analyzing the positions of the parties, the Commission concluded that it had jurisdiction to consider the petition. However, it found the petition inadmissible with respect to its claims regarding Articles 1, 5, 8, 10, and 25, because there was international res judicata pursuant to Article 47(d) of the American Convention. The Commission concluded that the petition was inadmissible with respect to the claimed violation of the right enshrined in Article 24 of the American Convention because it did not meet the requirement of exhaustion of

domestic remedies established in Article 46(1)(a) of said international instrument. The Commission decided to publish the present inadmissibility report and to include it in its Annual Report.

II. PROCESSING BY THE COMMISSION

6. The Commission received the petition on March 1, 2005 and registered it under the number P 291-05. The petitioners submitted additional communications on March 14, September 13, October 6, November 3, and December 12, 2005, on October 11, 2006, on January 5, March 5, July 15 and November 27, 2007, on March 8, July 9 and October 27, 2008, March 6 and 19, 2009.

7. On July 1, 2009 the Commission transmitted the relevant portions of the petition and additional communications to the State, requesting it to submit its response within two months as provided in its Rules of Procedure. On July 20, 2009 the State submitted its response, which was forwarded to the petitioners on August 14, 2009. The petitioners subsequently submitted additional communications on July 9 and September 14, 2009.

8. In a communication received on September 8, 2009, the petitioners requested a public hearing during the 137th Regular Session of the IACHR. On October 8, 2009 the IACHR notified the petitioners that the requested hearing could not be granted.

III. POSITIONS OF THE PARTIES

A. The Petitioners

9. The petition stated that the time in retirement of the officers who participated in the events of November 13, 1992 was not credited towards obtaining pension and promotion entitlements. They stated that a bill passed by Congress conferring these entitlements had been vetoed by the President. They also asserted that several judges, diplomats, and other civil and military officials forcibly retired during the Alberto Fujimori administration obtained promotions after the transition to democracy, with the time in retirement counting as actual active duty.

10. The petitioners emphasized that a former Minister of Defense, General Roberto Chiabra León, had been retired for the purpose of staff renewal on December 28, 1998. This forced retirement was invalidated by Supreme Decision 751 DE/EP, which reinstated him for active duty on December 8, 2001 and restored his rights. They pointed out that General Chiabra received promotion on January 1, 2001. They asserted that the same reasoning should be applied to the officers who participated in the events of November 13, 1992.[FN2]

[FN2] Petition of March 1, 2005, pp. 3, 4 and 7.

11. In subsequent communications, the petitioners stated that on March 14, 2005 the Peruvian Congress overrode the presidential veto and enacted Act 28472, whose Article 2

"credits the military officers who participated in the events of November 13, 1992 for time in retirement and/or on inactive status as time in actual and effective service to the State for the purposes of pensions and promotion to the next higher grade on a case-by-case basis." [FN3]

[FN3] Additional communication from the petitioners received on September 13, 2005, pp. 1, 3, and 4.

12. They stated that the Minister of Defense confirmed Article 2 of the aforementioned Act 28472 in Ministerial Decision 393-2005-DE/EP, published in the legal gazette El Peruano on April 23, 2005. However, this decision did not contain reference to "the effects on pensions and promotion to the next higher grade that were included in Act 28472." [FN4]

[FN4] Article 3 of Act 28482 reads as follows: "Said personnel shall be promoted to the next higher grade, effective retroactively to the year in which they should have been promoted by regulation, and shall be entered on the active duty list at their new grade, for which purpose the time-in-grade requirement shall be waived exceptionally. Such promotion shall include personnel who could not effectively be reinstated for duty because 35 years had elapsed since they were commissioned."

13. The petitioners stated that on June 5, 2005 [FN5] they filed an action for enforcement to compel the Ministry of Defense to acknowledge the provisions of Articles 2 and 3 of Act 28472. On June 16, 2005 the Fortieth Civil Court of Lima declared the action unfounded. On July 5, 2005 they appealed this decision to the Third Civil Division of Lima, which dismissed the appeal on September 15, 2005. On November 7, 2005 they lodged a constitutional appeal, which was admitted on November 14, 2005 and referred to the Constitutional Court. [FN6]

[FN5] Although the petitioners state that the action for enforcement was lodged on June 5, 2005, the copy of the court record in the IACHR file shows that this action was lodged on June 8, 2005.

[FN6] Additional communication from the petitioners received on December 12, 2005, p. 5.

14. The petitioners indicated that on June 20, 2006 the Constitutional Court ruled in favor of the plaintiffs in the action for enforcement and ordered the Ministry of Defense to enforce the provisions of Act 28472, Article 2, "crediting all of the plaintiffs in the action for enforcement for their time in retirement and/or on inactive status as time in actual and effective service to the State for the purposes of calculating their pensions and promoting them to the next higher grade." [FN7] The petitioners asserted that the Ministry of Defense lodged an action to vacate on June 20, 2006, which was denied by the Constitutional Court on July 24, 2006.

[FN7] Judgment of the Peruvian Constitutional Court on constitutional injury, Case 09754-2005-AC, Víctor Ernesto Obando Salas et al., Resolved paragraph 1(a).

15. The petitioners repeatedly asserted that the Ministry of Defense, the legislative branch, and other agencies of the Peruvian State hampered the granting of entitlements to the officers who participated in the events of November 13, 1992. They stated, for example, that "this more-than-twelve-year process of preventing the officers of November 13, 1992 from achieving their legitimate aspirations constitutes cruel and inhuman treatment and thus a violation of the right to humane treatment of these officers and their families, in direct contradiction of Article 5(1) of the American Convention on Human Rights." [FN8] They added that the number of years elapsed during which the State failed to provide reparation for said officers constituted an unjustified delay as well as circumstances that prevented the alleged victims from exhausting the remedies under domestic law.

[FN8] Additional communication from the petitioners received on September 13, 2005, p. 7.

16. The petitioners asserted that the Peruvian State violated the rights established in Articles 1, 5, 8, and 25 of the American Convention [FN9] by failing to provide adequate reparation to the officers who participated in the events of November 13, 1992. Lastly, they claimed that the State was responsible for violating the rights enshrined in Article 10 of said instrument, because it did not compensate the aforementioned officers. [FN10]

[FN9] Additional communication from the petitioners received on September 8, 2009, p. 2.

[FN10] Additional communication from the petitioners received on November 27, 2007, p. 2.

B. The State

17. The State claimed that that the situation described by the petitioners in their initial submissions are no longer in effect, because Articles 2 and 3 of Act 28472 of March 14, 2004 credited the participants in the events of November 13, 1992 for time in retirement and/or on inactive status as time in actual and effective service to the State. It indicated that on June 20, 2006 the Constitutional Court declared the action for enforcement of Articles 2 and 3 of said law to be well founded and recommended the executive branch to promote all of the officers who participated in the events of November 13, 1992 to the next higher grade.

18. The State emphasized that, according to the Constitutional Court judgment, both Article 3 of Act 28472 and the promotion recommendation were unenforceable regarding the officers to be promoted or already in the grade of general, because under Article 172 of the Peruvian Constitution the President of the Republic had sole authority to confer these grades. [FN11]

[FN11] Article 172 of the Peruvian Constitution reads as follows:

"The number of personnel of the Armed Forces and the National Police shall be established annually by the Executive Branch. The necessary funds shall be allocated in the Budget Act. Promotions shall be conferred in accordance with the law. The President of the Republic shall grant the promotion of generals and admirals of the Armed Forces and generals of the National Police, upon recommendation by the relevant military body."

19. The State indicated that, in accordance with the Constitutional Court judgment, on February 20, 2007 and July 21, 2008 the Ministry of Defense issued decisions granting the promotion of the following officers who participated in the events of November 13, 1992:

- Grade of Colonel: Carlos Galdós Chacón, César Rosado Cisneros, Marko Zarate Rotta, Luis Ruiz y Urquiza, Arturo Moreno Alcántara, Enrique Aguilar del Alcazár, José Chávez Begazo, Pedro Tello Delgado, and Eduardo Solano Pimentel.
- Grade of Lieutenant Colonel: Salvador Carmona, Hugo Ormeño Huapaya, Castro Gómez De La Torre, and César Cárceres Haro.
- Grade of Major: Federico Málaga Rubira.

20. Lastly, the State described and enclosed copies of 76 decisions of the Ministry of Defense and its internal agencies granting increases in the amount and terms of pensions and approving and ordering the payment of benefits owed to officers who participated in the events of November 13, 1992.

IV. ANALYSIS OF ADMISSIBILITY

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

21. The petitioners are eligible to submit petitions to the Commission under Article 44 of the Convention. The alleged victims were in the jurisdiction of the Peruvian State at the time of the cited events. For its part, the Peruvian State ratified the American Convention on July 28, 1978. Therefore, the Commission has jurisdiction *ratione personae* to examine the petition.

22. The Commission has jurisdiction *ratione loci* to consider the petition because it alleges that violations of rights protected by the American Convention took place in the territory of a State party to said Convention.

23. The Commission has jurisdiction *ratione temporis* inasmuch as, at the time of the facts alleged in the petition, the obligation to respect and ensure the rights recognized in the American Convention was in force in the State.

24. The Commission has jurisdiction *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Duplication of proceedings and international *res judicata*

25. Article 46(1)(c) of the American Convention sets as a requirement for the admissibility of petitions that the subject "is not pending in another international proceeding for settlement," and Article 47(d) of the Convention stipulates that the Commission shall consider inadmissible a petition that is substantially the same as one previously studied by the Commission or by another international organization.

26. The instant petition is based in two different situations. On the one hand, the petitioners have submitted a series of claims regarding measures taken by the Ministry of Defense and the Congress of the Republic to comply with the requests of the IACHR in the context of Case 11.084. In this connection, they assert violation of the rights established in Articles 1, 5, 8, 10, and 25 of the American Convention, claiming that the Peruvian State did not take the necessary measures to provide reparation to the officers who participated in the events of November 13, 1992.[FN12] On the other hand, the petitioners have alleged discriminatory treatment of officers who participated in the events of November 13, 1992 and who, because of the Constitutional Court decision of June 20, 2006, were not promoted to the next higher grade. These were officers who already occupied or would occupy the grade of general.[FN13]

[FN12] See paragraphs 15 and 16 above.

[FN13] See paragraph 18 above.

27. The State has asserted that, in its decision of June 20, 2006, the Constitutional Court ordered the Ministry of Defense to enforce the provisions of Articles 2 and 3 of Act 28472, which credited the officers who participated in the events of November 13, 1992 for time in retirement and/or on inactive status as time in actual and effective service to the State for the purposes of calculating their pensions and promoting them to the next higher grade. The State also described a series of Ministry of Defense decisions granting the alleged victims benefits owed and entitlements.[FN14]

[FN14] See paragraph 20 above.

28. The Commission notes that the petitioners' claims regarding the rights enshrined in Articles 1, 5, 8, 10, and 25 of the American Convention are based on alleged delays and obstructions of the measures taken by the State to compensate the officers who participated in the events of November 13, 1992 for the convictions, arbitrary detention, and inhuman treatment to which they were subjected.[FN15] As indicated in paragraph 3 above, these submissions duplicate matters of fact and law already considered by the IACHR in Case 11.084 and currently under the process of supervising compliance with the requests made in said case. It should be noted that in a number of their communications the petitioners refer interchangeably to Case 11.084 and the instant petition (P 291-05).

[FN15] See above, note 1.

29. On the basis of the above considerations, the Commission concludes that the petitioners' claims regarding the rights enshrined in Articles 1, 5, 8, 10, and 25 of the American Convention involve issues previously settled in Report 27/94 and currently at the compliance supervision stage, which renders them international *res judicata*. Therefore, the IACHR declares these aspects of the petition inadmissible under Article 47(d) of the American Convention.

30. With regard to the claimed violation of the right set forth in Article 24 of the American Convention of the officers who were denied the promotion entitlement established in Act 28472, the parties have not mentioned other international proceeding for settlement or petition already considered by the Commission or other international organization, nor is there any indication in the case file of the existence of such.

C. Exhaustion of domestic remedies

31. Article 46(1)(a) of the American Convention provides that, for a complaint lodged with the Inter-American Convention pursuant to Article 44 of the Convention to be admissible, all remedies under domestic law must have been pursued and exhausted in accordance with the generally recognized principles of international law. The purpose of this requirement is to allow national authorities to be seized of the alleged violation of a protected right and to have the opportunity to resolve it if appropriate before it is considered at the international level.

32. The Peruvian State did not raise the objection of non-exhaustion of domestic remedies, which is considered to be a tacit relinquishment of the right to invoke it. Despite the tacit waiver by the Peruvian State, the Commission deems it necessary to rule on the exhaustion of domestic remedies, according to the information available in the file.[FN16]

[FN16] IACHR, Report 44/09, Petition 12.161, Peru, *Ciro Abdías Boderó Arellano*, March 27, 2009, par. 26; Report 41/09, Petition 459-03, *Roberto Villeda Arguedas et al.*, Guatemala, March 27, 2009, par. 33; Report 107/06, Petition 12.318, Peru, *Jorge Teobaldo Pinzás Salazar*, October 21, 2006, par. 28.

33. According to information provided by the parties, on June 8, 2005 an action for enforcement was brought against the Ministry of Defense to compel compliance with Articles 2 and 3 of Act 28472. The action claimed that Ministerial Decision 393-2005-DE/EP of the Ministry of Defense, published in the legal gazette on April 23, 2005, provided partial compliance with the aforementioned provisions but failed to cover the award of pension entitlements and promotion to the next higher grade.[FN17]

[FN17] Judgment of the Peruvian Constitutional Court on constitutional injury, Case 09754-2005-AC, *Víctor Ernesto Obando Salas et al.*, p. 1.

34. According to the case file, on June 16, 2005 the Fortieth Civil Court of Lima declared the action for enforcement unfounded. This decision was appealed on July 5, 2005 to the Third Civil Division of Lima, which denied it on September 15, 2005. On November 7, 2005 the petitioners filed a constitutional appeal, which was decided by the Constitutional Court on June 20, 2006. The parties did not indicate the existence of any other remedy or lawsuit.

35. The Commission notes that the purpose of the action for enforcement lodged on June 8, 2005 was to compel the Ministry of Defense to credit the officers who participated in the events of November 13, 1992 for "time in retirement and/or on inactive status as time in actual and effective service to the State for the purposes of pensions and promotion to the next higher grade, and to promote them to the next higher grade, retroactively to the year in which they should have been promoted..."[FN18] Thus, this action was intended to address compliance with the provisions of Act 28472, but not an arbitrary difference in treatment of the alleged victims. Indeed, the petitioners claimed that the Constitutional Court's reasoning in its judgment of June 20, 2006 implies discriminatory treatment with regard to the officers who already occupied or would occupy the grade of general.

[FN18] Judgment of the Peruvian Constitutional Court on constitutional appeal, Case 09754-2005-AC, Víctor Ernesto Obando Salas et al., p. 1.

36. The petitioners did not claim to have filled an appeal or another remedy against the alleged discriminatory treatment to the prejudice of the officers who were not promoted to the next higher military grade, nor is there any indication of such from the evidence in the case file. Therefore, the Commission considers that, with respect to the alleged violation of the right enshrined in Article 24 of the American Convention, the petition does not meet the requirement of exhaustion of domestic remedies established in Article 46(1)(a) of the American Constitution.

37. The Commission abstains from considering the other admissibility requirements set forth in the American Convention since the matter is rendered moot.[FN19]

[FN19] See, inter alia, IACHR, Report 42/09, Petition 443-03, Peru, David José Ríos Martínez, March 27, 2009; Report 87/05, Petition 4580/02, Peru, October 24, 2005; Report 73/99, Case 11.701, Mexico, May 4, 1999; Report 24/99, Case 11.812, Mexico, March 9, 1999; and Report 82/98, Case 11.703, Venezuela, September 28, 1998.

V. CONCLUSION

38. The Inter-American Commission concludes that it has jurisdiction to consider the instant petition but that it does not meet the requirements established in Articles 47(d) and 46(1)(a) of the American Convention. Therefore, it declares the petition inadmissible and has no need to

proceed with an analysis of the merits of the case. On the basis of the factual and legal arguments set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the instant petition inadmissible with respect to the claims under Articles 1, 5, 8, 10, and 25 of the American Convention because there is international res judicata pursuant to Article 47(d) of said instrument.
2. To declare the instant petition inadmissible with respect to the alleged violation of Article 24 of the American Convention because it does not meet the requirement of exhaustion of domestic remedies established in Article 46(1)(a) of said international instrument.
3. To notify the petitioners and the State of this decision.
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 12th day of the month of November, 2009. (Signed): Luz Patrica Mejía Guerrero, President; Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts, and Paolo G. Carozza, members of the Commission.