

**REPORT No. 106/10**  
PETITION 147-98  
ADMISSIBILITY  
OSCAR MUELLE FLORES  
PERU  
July 16, 2010

**I. SUMMARY**

1. On April 8, 1998, the Inter-American Commission on Human Rights (hereinafter the "Commission," Inter-American Commission," or "IACHR") received a petition lodged on his own behalf by Oscar Muelle Flores (hereinafter "the petitioner" or "the alleged victim"), in which he alleged that the Republic of Peru (hereinafter "the State" or "the State of Peru") is responsible for noncompliance with two *amparo* judgments that acknowledged certain of his rights, including, he claimed, his inclusion under the pension and compensation system stipulated in Decree-Law 20530, and the renewable payment of his retirement pension. The petitioner alleged that the State of Peru has not complied with its obligation to execute the judicial decisions of the Supreme Court of Justice and the Constitutional Court, and that this is a violation of the rights established in Articles 24 and 25 of the American Convention.

2. The State, for its part, described the judicial proceedings carried out in the two *amparo* complaints filed by the petitioner and affirmed that the two petitions were declared to have merit and are currently in the process of execution.

3. After examining the position of the parties in the light of admissibility requirements set out in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to examine the petition and that the facts narrated in it could characterize a violation of the rights protected by Articles 8.1, 21 and 25.2(c) of the American Convention. Consequently, it decided to notify the parties of this admissibility report and to publish it in its Annual Report.

**II. PROCEDURES BEFORE THE COMMISSION**

4. The Commission received the petition on April 8, 1998, and registered it as number P147-98. On April 28, 2004, the IACHR requested the petitioner to provide updated information, which was sent on June 14, 2004.

5. On April 13, 2009, the IACHR transmitted the pertinent parts of the original petition and additional communications to the State, and, in accordance with its Rules of Procedure, it granted the State two months to present its response. On March 1, 2010, the State presented its response, which was forwarded to the petitioner on April 7, 2010.

6. In a communication dated May 29, 2010, received by the Executive Secretariat on July 8, 2010, the petitioner presented additional information, which the Commission transmitted to the State on July 13, 2010.

**III. POSITION OF THE PARTIES**

**A. Position of the petitioner**

7. The petitioner alleged that on September 30, 1990, he retired as Assistant General Manager of the "Tintaya" Special Mining Company S.A., a state-owned enterprise at that time. According to his account, he was included in the pension system under Decree-Law 20530, by Management Resolution N°AD-0884/90-R of May 15, 1990, based on Board of Directors Decisions N°155/88 of December 22, 1988 and 029/90 of February 8, 1990. These agreements authorized the government to incorporate employees into said pension system and established the corresponding regulations for that purpose.

8. He stated that up to February 1991, he received the pension to which he was entitled. That month, however, in an internal company communication (No. GA-0130/91), he learned of the suspension of application of Decree Law 20530 to former employees of the company.

9. In view of this situation, the petitioner filed an *amparo* petition, which was declared to have merit on July 19, 1991, a decision that was upheld by an appeals court on May 29, 1992, and by the Supreme Court of Justice on February 2, 1993. According to the petitioner, in the final judgment, the Supreme Court found that:

“Communication GA-0131/91, providing for suspension ordered by the respondent of the complainant’s inclusion in the pension and compensation system of Decree-Law 20530 and payment of his pension, is not applicable to the complainant, and his rights are hereby restored to their status prior to this breach of the constitution ...”<sup>1</sup>

10. The petitioner contends that, despite the favorable decision obtained through the *amparo* action, on February 17, 1993, the company issued a new Board of Directors Decision No. 023/93, suspending Decisions Nos. 155 and 029/90 issued by the Board of Directors of the company in 1990, and consequently also suspending payment of the retirement pensions of the former employees, including himself.

11. In these circumstances, the petitioner brought another *amparo* action, that was declared without merit by the lower and appeal courts, in judgments issued on February 23 and July 14, 1995, respectively. In both judgments, the second *amparo* action was considered to be unnecessary, because the decision adopted in the first *amparo* action had the authority of *res judicata* and should impede any attempt to suspend the application of Decree Law 20530. The Supreme Court of Justice upheld these judgments on August 26, 1997.

12. The petitioner alleges that subsequently, on December 10, 1999, the Constitutional Court revoked the decision issued by the Supreme Court of Justice in the second *amparo* action, declaring it without merit. On that occasion, the Constitutional Court determined that the company’s Board of Directors Decision No. 023/93 was not applicable to the petitioner, and ordered the respondent company to continue the renewable retirement pension payments that Mr. Muelle had been receiving.

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<sup>1</sup> Communication of the petitioner received on November 12, 1998, annexes, Decision of the Supreme Court of Justice of February 2, 1993, Case file No. 1783-92

13. According to information presented by the parties, on April 7, 1997, the Fifth Civil Court of Lima issued a decision ordering execution of the Supreme Court's final judgment of 1993, in the following terms:

"THIS SERVES AS FINAL NOTICE TO THE RESPONDENT, the special mining company Tintaya Corporation (today, BHP Tintaya S.A.), to comply without restrictions, and within three days, with the order handed down by the Supreme Court on February 2, 1993, failing which certified copies will be issued for preparation of the corresponding criminal complaint...".<sup>2</sup>

14. From documents provided by the petitioner, it appears that in 1994, the respondent company lodged a complaint in administrative court to declare the inclusion of Mr. Muelle Flores in the pension system of Decree-Law 20530 unlawful. However, the Constitutional and Corporate Law Division of the Supreme Court of Justice, in its decision handed down on October 29, 1997, declared said complaint without merit, thereby confirming the fact that petitioner belonged to the aforesaid pension system.

15. The petitioner also reported that he had presented a criminal complaint against certain officials of the company on charges of violation of freedom to work and abuse of authority. However, he explained that on June 30, 1997, the Second Criminal Court found that the legal action was barred by the statute of limitations, and ordered the proceeding closed.

16. The petitioner pointed out that although the "Tintaya" Special Mining Company had been paying him the amount of eight hundred soles a month since 1999, this amount was not consistent with the amount determined by the Supreme Court of Justice on February 2, 1993 and by the Constitutional Court on December 10, 1999. He indicated that in the latest decision of the Constitutional Court, it determined renewable payment of his pension comparable to that of active employees, which was not done by the respondent company. The petitioner maintained that it is not possible to quantify the exact amount to which he is entitled since he does not have access to the payroll of employees working for the respondent company. He reported, however, that the amount he was being paid by the company had been considerably reduced in real terms, since no account was taken of the rate of inflation of more than 2000% that prevailed in Peru in the 1990s, and that it did not comply with the criteria for renewability and leveling of the system stipulated in Decree-Law 20530.

17. The petitioner further contends that it is the private company BHP "Tintaya" S.A., now called Xstraya Tintaya S.A., the one obligated to make the pending pension payments, by virtue of the fact that at the time of privatization, it took over the assets and liabilities of the "Tintaya" Special Mining Company S.A., owned by the State of Peru, for which he worked as General Manager.

18. In his May 29, 2010 communication, received by the IACHR on July 8, 2010, the petitioner informed that on April 26, 2010, the 38th Civil Court of Lima, under request of Xstraya Tintaya S.A., issued a decision nullifying its own previous resolutions which ordered the company to comply with the pending pension payments, and at the same time called upon Mr. Muelle to present his claim against the State instead of the company, according to the law. The decision was notified to the petitioner on May 17, 2010, and on the same date the alleged victim appealed.

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<sup>2</sup> Communication of the petitioner received on June 14, 2004, annexes, Decision of the Fifth Civil Court of Lima of April 7, 1997, Case file No. 58-96

## **B. Position of the State**

19. In its answer to the complaint, the State described the judicial proceedings and decisions issued in relation to the petitioner's situation. It acknowledged that in this matter, evidence shows a violation of Mr. Muelle's pension rights, that the Constitutional Court considered in its judgment on December 10, 1999, and that the pension rights acquired by petitioner under Decree-Law 20530 cannot be disavowed by the respondent company unilaterally, outside the terms stipulated by law.

20. It stated that the 38th Civil Court of Lima, which assumed jurisdiction for execution of the judgment of February 2, 1993, ordered the Tintaya Special Mining Company S.A. to comply with the pension payments pursuant to the regime stipulated in Decree-Law 20530. It indicated that during the execution stage, the petitioner requested that his pension be brought in line with the post of general manager of that company.

21. The State indicated that on April 6, 2009, the 38th Civil Court of Lima issued a notice to the Company and called for compliance with the Supreme Court's final decision dated February 2, 1993, indicating that should it fail to do so, according to the Decision dated April 7, 1997, certified copies would be issued in preparation to a criminal complaint against the responsible parties. According to the State's explanation, the Xstraya Tintaya S.A. company had previously appeared at the execution process and stated that it was not responsible for any future liabilities, and that the competent entity responsible for pending pension payments is the Ministry of Economy and Finance, in accordance with the provisions of Law No. 27719, ratified by Law 28115 of December 6, 2003. The State did not deliver an opinion on said statement by the respondent company ordered to make payment in the execution process.

## **IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY**

### **A. Jurisdiction *ratione personae*, *ratione loci*, *ratione temporis* y *ratione materiae* of the Commission**

22. The petitioner is entitled under Article 44 of the American Convention to lodge a petition with the IACHR. The petition states that the alleged victim is a natural person, with respect to whom Peru has pledged to respect and ensure the rights established in the American Convention. Moreover, Peru ratified the American Convention on July 28, 1978. Therefore, the Commission has personal jurisdiction to examine the petition.

23. The Commission has territorial jurisdiction to deal with the petition, because it alleges violations of rights protected by the American Convention that took place within the territory of a state party thereto.

24. The IACHR has temporal jurisdiction because the facts alleged in the petition took place when the obligation to respect and ensure the rights established in the American Convention were already in force for the State of Peru.

25. Finally, the Commission has material jurisdiction, because the petition refers to alleged violations of human rights protected by the American Convention.

## B. Exhaustion of domestic remedies

26. Article 46.1.a of the American Convention states that for a complaint lodged with the Inter-American Commission in compliance with Article 44 of the Convention to be admissible, the remedies available under domestic law must have first been pursued and exhausted in accordance with generally recognized principles of international law. That requirement is intended to facilitate the domestic authorities' examination of the alleged violation of a protected right and, if appropriate, to enable them to resolve it before it is brought before an international venue.

27. The requirement of prior exhaustion applies when there are adequate and effective remedies actually available in the national system to correct or redress the alleged violation. In this context, Article 46.2 specifies that the requirement does not apply when the domestic legislation does not provide for due process of law for the protection of the right in question, or when the alleged victim has been denied access to the remedies under domestic law or when there has been an unwarranted delay in rendering judgment under the aforesaid remedies. As indicated in Article 31 of the Commission's Rules of Procedure, when the petitioner alleges one of these exceptions, it is up to the State to demonstrate that the remedies under domestic law have not been exhausted, unless that is clearly evident from the record.<sup>3</sup> In the present case, the State of Peru did not allege lack of exhaustion of domestic remedies; on the contrary, in its response it described in detail the domestic judicial proceedings conducted and the corresponding decisions issued.<sup>4</sup>

28. The petitioner alleged failure to comply with the final judgment handed down by the Supreme Court on February 2, 1993 and ratified by the Constitutional Court on December 10, 1999. He further referred to a third judgment also handed down by the Supreme Court on October 29, 1997, that reiterated that Oscar Muelle Flores was protected by the pension system stipulated in Decree-Law 20530.

29. In cases of alleged noncompliance with judicial decisions, the IACHR has maintained that, since the situation is reported under mechanisms provided for in domestic legislation, it is up to the competent judicial organ to adopt the necessary measures to ensure execution of the decision.<sup>5</sup> In this case, it is evident that Oscar Muelle Flores not only reported the alleged failure to carry out the judgment to the pertinent judicial authorities, but that he also initiated judicial actions designed to correct this situation and has participated actively in the execution process before the 38th Civil Court of Lima, his last intervention in the process was the submission of an appeal on May 17, 2010, against the nullifying decision issued by aforementioned Court on April 26, 2010. Notwithstanding the above, the proceeding to enforce execution of the Supreme Court's final judgment of February 2, 1993 is still in process, according to the petitioner, due to deficiencies attributed to the State. In its March 1, 2010 memorial, the State confirmed that as of April 6, 2009, that said proceeding was still open, but it did not indicate the steps planned or being taken to conclude it, just stating that further information would be submitted to the Commission.

30. Based on the aforesaid considerations, the Commission considers that the petitioner availed himself of the domestic remedies available to obtain execution of judgment, without any results to date; hence it finds that there has been an unwarranted delay pursuant to the terms of Article 2(c) of the American Convention.

## C. Deadline for presentation

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<sup>3</sup> IACHR, Report N° 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, March 7, 2005, paras. 33-35; IACtHR., Case of the Mayagna Community (*Sumo*) *Awas Tingni. Preliminary Objections*, Judgment of February 1, 2000. Series C No. 66, para. 53; IACtHR., *Case of Durand and Ugarte. Preliminary Objections*, Judgment of May 28, 1999. Series C No. 50, para. 33; and, IACtHR., *Case of Cantoral Benavides. Preliminary Objections*, Judgment of September 3, 1998. Series C No. 40, para. 31.

<sup>4</sup> IACHR, Report 10/09, Petition 4071-02, Argentina, *Mercedes Eladia Farelo*, March 13, 2009. para. 37.

<sup>5</sup> IACHR, Report N° 43/09, Petition 1166-05, Peru, Jorge Rafael Valdivia Ruiz, March 27, 2009, para. 38.

31. Article 46.1(b) of the Convention establishes that in order for a petition to be declared admissible, it must be lodged within a period of six months following the date on which the complainant was notified of the final judgment. This rule does not apply when the Commission finds that any of the exceptions to exhaustion of domestic remedies established in Article 46.2 of the Convention apply. In such cases, the Commission must determine whether the petition was presented within a reasonable period of time in accordance with Article 32 of its Rules of Procedure.

32. Taking into account the active role played by the alleged victim in the proceedings for execution of judgment and that the alleged violation of the right to judicial protection continued up to the date of presentation of the petition, the IACHR considers that the requirement stipulated in Article 46.1(b) of the American Convention has been met.

#### **D. Duplication of procedures and *res judicata***

33. Article 46.1(c) of the Convention establishes that petitions are subject to the requirement that the subject "is not pending in another international proceeding for settlement" and Article 47.d of the Convention establishes that the Commission shall consider inadmissible any petition that is substantially the same as one previously studied by the Commission or by another international organization. In the present case, the parties have not referred to either of these two circumstances, nor can they be inferred from the case file.

#### **E. Characterization of the alleged facts**

34. For admissibility purposes, the Commission must decide whether the petition states facts that tend to establish a violation, as stipulated in Article 47.b of the American Convention, and if the petition is "manifestly groundless" or "obviously out of order," in accordance with subparagraph (c) of that Article. The standard for assessment of these points of law is different from that required to decide on the merits of a petition. The Commission must conduct a *prima facie* evaluation to determine whether the petition establishes the basis for an apparent or potential violation of a right guaranteed by the Convention, but not whether it establishes the existence of a violation. This evaluation involves a summary analysis that does not entail a prejudgment or advance opinion on the merits.

35. With regard to the alleged violation of the right to judicial protection, the Commission considers that if the facts alleged by the petitioner are correct, they could characterize a violation of the right protected in Article 25.2.c of the American Convention.

36. Moreover, the alleged delay of more than 17 years in the execution process could characterize a violation of the right to be heard by a competent tribunal within a reasonable time. Further, the Jurisprudence of the Inter American System has established that the patrimonial damage caused by the State's non-compliance with the judgments that were intended to protect the right to a pension in some circumstances could characterize a violation of the right to property.<sup>6</sup> Thus, by virtue of the principle of *iura novit curia*, the IACHR will study in the merits stage the possible violation of the rights set forth in Articles 8.1 and 21 of the American Convention.

37. From the information provided by the petitioner, the Commission does not have sufficient evidence to decide on a possible violation of the right established in Article 24 of the American Convention.

#### **V. CONCLUSIONS**

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<sup>6</sup> See I/A Court H.R., *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*. Judgment of July 1, 2009. Series C N° 198, para. 85. See also IACtHR. *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C N° 98, para. 103.

38. Based on the above-mentioned considerations of fact and of law, and without prejudice to the merits of the case, the Inter-American Commission concludes that petition 147-98 meets the requirements for admissibility stipulated in Articles 46 and 47 of the American Convention. Consequently,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

**DECIDES:**

1. To declare petition 147-98 admissible, insofar as it relates to Articles 8.1, 21 and 25.2(c) of the American Convention.
2. To declare it inadmissible with regard to Article 24 of the American Convention.
3. To notify the State and the petitioner of this decision.
4. To publish this decision and include it in its Annual Report, to be presented to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 16<sup>th</sup> day of the month of July, 2010. (Signed: Felipe González, President; Paulo Sergio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; María Silvia Guillén, José de Jesús Orozco Henríquez and Luz Patricia Mejía Guerrero, members of the Commission).