REPORT No. 119/12
PETITION 185-03
INADMISSIBILITY
JOSÉ ADRIÁN MEJÍA MENDOZA *ET AL.*
EL SALVADOR
November 13, 2012

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter the "Commission", the "Inter-American Commission" or the "IACHR") received a petition on March 7, 2003, initially lodged by the *Fundación de Estudios para la Aplicación del Derecho* (hereinafter "FESPAD")[1] and later by Vivian Lizeth Gutiérrez Luna[2] and Saúl Antonio Baños[3] (hereinafter the "petititoners"). The petition was filed against the State of El Salvador (hereinafter the "State" or the "Salvadoran State") and alleged its failure to respect and ensure the right to work and job stability, and the right to judicial guarantees and job protection, to the detriment of the following persons: 1) José Adrián Mejía Mendoza, 2) Gregorio Francisco Linares Escamilla, 3) Miguel Angel Alfaro Sánchez, 4) Pedro Martir Quiusqui, 4) Saúl Flores Fabian, 5) Francisco García Saldaña, 6) Miriam Santana Benavides Benavides, 7) Julio César Mena Jacinto, 8) Jaime Ernesto García Escalante, 9) Martha Vilma González Morales, 10) Angel Danilo Mejía Rivas, 11) Marcos Obdulio Alas Alas (hereinafter the "alleged victims").

2. The petitioners claim that the State is responsible for violation of the rights recognized in articles 8(1) (judicial guarantees), 25 (judicial protection) and 26 (progressive development) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"), to the detriment of the alleged victims. They are also claiming violation of articles 4 and 7(d) of the Protocol of San Salvador and articles XIV, XVIII of the American Declaration.

3. The State, for its part, contends that the petition should be declared inadmissible on the grounds that domestic remedies were not exhausted. It also claims that the alleged victims' human rights were not violated and that this petition is substantially the same as one previously examined or decided by another intergovernmental body of which the State concerned is a member.

4. After examining the parties' positions, the Commission concludes that it is competent to examine the petition and that the case is inadmissible based on articles 46 and 47 of the American Convention. The Commission also decides to notify the parties of this decision, to publish it and include it in its Annual Report to the General Assembly of the Organization of American States.

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[1] On July 11, 2010, the *Fundación de Estudios para la Aplicación del Derecho* expressly resigned as the alleged victims' legal representative.

[2] Vivian Lizeth Gutiérrez Luna was accredited as a petitioner on July 8, 2010.

[3] Saúl Antonio Baños was accredited as a petitioner on July 8, 2010.

II. PROCESSING WITH THE COMMISSION

5. The Commission received the petition on October 16, 2003, and assigned it number 902-03. It forwarded the petition to the Salvadoran State on November 18, 2003, and requested that it submit its response within two months, in keeping with Article 30(2) of the IACHR's Rules of Procedure. On January 12, 2004, the State requested a one-month extension, which the Commission granted on January 20, 2004. The State's response was received on February 20, 2004 and was duly forwarded to the petitioners.

6. The IACHR received further information from the petitioners via communications dated November 24, 2004, December 20, 2004, February 7, 2005, July 13, 2010, November 17, 2010, December 27, 2011, and March 1, 2012. Those communications were duly forwarded to the State.

7. The Commission received information from the State on the following dates: March 8, 2005, March 28, 2011, and March 27, 2012. Those communications were duly forwarded to the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners

8. The petitioners assert that, working from a proposal presented by the Minister of the Treasury, on December 19, 2001 the Legislative Assembly approved Decrees 679 and 680 on the Budget Law and Salaries Law, respectively. Under those decrees, thousands of positions in the public sector were eliminated. As a result of the two decrees, 8,322 jobs of public-sector employees who worked under the Salaries Law and were protected by the civil service system, were lost. In the day-laborer system, 130 posts were cut; and a total of 3,970 contract positions were also cut.

9. The petitioners contend that on December 20, 2001, the alleged victims were notified that their jobs were being eliminated, by decree, without any prior legal justification. They state that prior to the dismissals, the heads of the government offices had informed the state workers of the passage of a voluntary retirement decree under which they would be paid some retirement-related compensation. Many workers put their names on lists to sign up for retirement, but the "voluntary retirement" decree never materialized.

10. The petitioners argue that the elimination of the alleged victims' posts effective January 1, 2002, meant that they lost their social security and their right to a retirement pension, because as of that date they were still not eligible for retirement. As a result they were left entirely unprotected.

11. The petitioners assert that under the Constitution, public employees have job stability. In this particular case, while Article 131, paragraph 9 of the Constitution gives the Legislative Assembly the authority to create and eliminate posts, it must not do so arbitrarily and without justification. They support their position by citing the special report on elimination of positions within the public sector issued by the Ombudsperson for the Defense of Human Rights in response to the passage, approval, enactment and entry into force of the Law on the General Budget of the Nation (2002), the Salaries Law (2002) and the Amendments to the Civil Service Law. In her report, the Ombudsperson observes that there is no evidence to suggest that technical studies were prepared, used, consulted, evaluated or weighed in the process of approving the law that cut government positions, or that the number of posts cut was arrived at through an analysis of proportionality, required by human rights standards, as the option that would put the least strain on the human rights system.

12. According to the petitioners, the power to create and eliminate positions has its limits. According to the Special Report done by the Ombudsperson, at least three criteria must be met to eliminate posts: the elimination of the government positions must figure in a formal law; the purpose of that law must be the general welfare in a democratic society; the *quantum* or size of the cut must be that strictly necessary to achieve the end sought. In its report, the Office of the Ombudsperson pointed to the

absence of a reasonable, objective and technical justification for the elimination of posts. The petitioners claim that the report states that in the public institutions where posts were eliminated no consideration was given to criteria such as job skills and capacities, employment record, disciplinary record, and other considerations, which meant that the measure was arbitrary, as no analysis was done examining the necessity of any given post.

13. The petitioners also cite the "Special Review Report on the Treasury Ministry's Elimination of Posts in 2001," prepared by the Court of Accounts of the Republic. That Report established that the fact that no examination was done to determine what posts could be eliminated called into question the transparency of the process; there was no evidence that the Treasury Ministry conducted any analysis to determine which posts could be eliminated and make the decision to eliminate them on December 31, 2001.

14. As for the exhaustion of domestic remedies, the petitioners maintain that on March 21, 2002, the alleged victims filed a petition of *amparo* (318-2002) against the following officials: 1) the Treasury Minister, as the person responsible for preparing the proposed General Budget of the Nation and the Salaries Law; 2) the Council of Ministers which, under the Constitution, is to prepare the draft budget of the country's revenues and expenditures and present it to the Legislative Assembly, and 3) the Legislative Assembly, by virtue of its approval of those bills.

15. The petition was declared inadmissible by a decision dated August 8, 2002, which was notified on August 21, 2002. The petitioners assert that on August 26 of that year, they filed an appeal seeking reversal of that ruling, which was dismissed on the grounds that it was filed belatedly. The parties were notified of the decision on the appeal seeking reversal on September 11, 2002. According to the petitioners, rulings declaring an appeal inadmissible or procedurally out of order have the effect of rendering the decision being appealed *res judicata,* thereby exhausting the domestic remedies.

16. As for the State's argument that the petition is substantially the same as one already studied by another international body, the petitioners attached the Sworn Statement of José Adrián Mendoza and the affidavit issued by the *Central Autónoma de Trabajadores Salvadoreños* (CATS) stating that he is not a member of that organization. They also point out that no proceeding or active petition is pending with the ILO.

B. The State

17. The State argues that the elimination of positions is an authority given in the Constitution, whose Article 131, paragraph 9 provides that "The Legislative Assembly shall… (9) create and eliminate positions and assign salaries to officials and employees according to the civil service regime." It also points out that Article 219 provides that the Law shall regulate the Civil Service and especially "the conditions that must be met to enter government service, and for transfers, suspensions and terminations; the duties of public servants and the appeals they can invoke against decisions that affect their interests." Consistent with this provision, the Civil Service Law provides that all government posts, offices or jobs may be created or eliminated only on the basis of law.

18. According to the State, the lawmaker's freedom to unilaterally order the elimination of posts within the structure of government is generally circumscribed by certain limits: it must be done by the Legislative Assembly in a manner that does not create an insurmountable obstacle or make it impossible for other state entities to be reasonably able to achieve their institutional ends and must not constitute undue interference in the independent performance of the functions of government; the posts and functions recognized in the Constitution must be respected. The State also points out that the elimination of posts results in the indirect termination of the appointment of the public official or government employee who held that post; therefore, any such concrete legal injury will trigger a corresponding obligation to make reparations.

19. The State observes that in 2002, every one of the workers who was serving in a post eliminated by the Legislative Decrees that contain the amendment to the Civil Service Law and the Law

on the General Budget of the Nation for 2001, was paid the compensation that he or she was due. Their acceptance of that compensation constituted tacit consent.

20. As for the right to job stability, the State maintains that this does not mean that the State is obligated to retain a post that is no longer necessary; indeed, the State "has constitutional authority to unilaterally eliminate a post, and is under no legal obligation to hear the arguments of those likely to be affected, as the question of which government positions are to be created and retained must be dictated by the community's needs and interests, the services to be provided and public functions to be performed."

21. The State reports that in the ruling on the petition seeking *amparo* relief, the Constitutional Chamber of the Supreme Court of Justice held that "the argument premised on the rights to work, to job stability and to a hearing, as made by the claimant, is so fatally flawed that this Court cannot take cognizance of and decide the matter and must therefore dismiss it *ab initio* on the grounds that it is inadmissible." The Supreme Court observed that legal standing had not been established and that the petition failed to prove that the Treasury Ministry and Council of Ministers did not have the authority to act as they did. On the matter of legal standing, the Supreme Court wrote that the argument of a violation of the right to work was based on the State's noncompliance with a policy of full employment; however, the argument does not assert how any single individual was thereby materially harmed, which is the issue that courts can properly address. As for the lack of competence argument, the Supreme Court held that the actions taken by the Treasury Ministry and Council of Ministers, against whom the complaint was brought, are not grounds for a legal grievance, because those actions did not necessarily affect the plaintiffs directly and only became binding when the Legislative Assembly approved the bills for the Salary Law and Law on the General Budget and when the President signed the two bills into law. The petition for *amparo* relief was declared inadmissible on August 8, 2002.

22. The State maintains that the petitioners did not exhaust the domestic remedies, as they had the option to file another petition seeking *amparo* relief. Because their original petition was declared inadmissible on the grounds of the above-mentioned defects, but was not declared out of order, it is understood that they retain the right to file another petition. Therefore, the alleged victims could have legitimately re-filed their petition, with the defects corrected.

23. The State further alleges that the petitioners could choose between the regular courts and the contentious-administrative jurisdiction, an avenue they did not pursue. Specifically, it points out that the contentious-administrative jurisdiction has competence to hear disputes that arise in relation to the legality of the actions of the Public Administration. It argues that the law defines the Public Administration as: 1) the executive branch and its offices, including autonomous, semi-autonomous and other decentralized institutions of the State; ii) the legislative and judicial branches and independent bodies in the exceptional cases in which they perform administrative functions, and iii) local government. It writes that there are domestic precedents involving persons who have resorted to the contentious-administrative jurisdiction and who "have not only been able to exercise their right of petition, but have also gotten rulings in their favor, ordering their reinstatement when the law and the facts support such a finding."

24. Furthermore, on January 30, 2002, the International Labour Organisation sent the Salvadoran Government a communication in which it reported that the *Central Autónoma de Trabajadores Salvadoreños* (CATS) had sent the ILO a note denouncing the dismissal of union leaders and the threat of massive dismissals upon amendment of the Civil Service Law and approval of the national budget. The State's contention is that the petition filed with the ILO is essentially the same one filed with the Commission and that the Commission should therefore find the petition inadmissible under its Rules of Procedure as it essentially duplicates a petition pending or already examined by another international governmental organization of which the State concerned is a member.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

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

25. The petitioners are, in principle, authorized to lodge petitions with the Commission under Article 44 of the American Convention. The Commission notes in this regard that in the original brief, the petitioners named 12 persons as the alleged victims. Hence, the Commission observes that the alleged victims named in the petition are individuals whose rights under the American Convention the State of El Salvador pledged to respect and ensure.

26. Under Article 44 of the American Convention, the petitioners are, in principle, authorized to lodge petitions with the Commission. The alleged victims named in the petition are 12 individuals whose rights under the American Convention the State of El Salvador undertook to respect and ensure. With regard to the State, the Commission observes that El Salvador has been a State party to the American Convention since June 23, 1978, the date on which it deposited its instrument of ratification of the Convention. Furthermore, El Salvador deposited the instrument of ratification of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) on June 6, 1995. Therefore, the Commission has competence *ratione personae* to examine the petition. The Commission also has competence *ratione loci* to examine the petition inasmuch as it alleges violations of rights protected by the American Convention and by the Protocol of San Salvador, said to have occurred within the territory of El Salvador, a State party to those two treaties. As for the alleged violations of the American Declaration, the Commission reiterates that once the Convention has entered into force in a State, it and not the Declaration becomes the specific source of law to be applied by the Commission, as long as the petition alleges violation of substantially identical rights set forth in both instruments and a continuing violation is not involved.[4] The Commission will, therefore, refer only to the provisions of the Convention.

27. The Commission has competence *ratione temporis* inasmuch as the obligation to respect and ensure the rights protected under the American Convention was already in effect for the State on the date on which the facts alleged in the petition were said to have occurred. Finally, the Commission has competence *ratione materiae* because the petition denounces possible violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

28. Article 46(1)(a) of the American Convention provides that in order for a complaint submitted to the Inter-American Commission under Article 44 of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) of the Convention establishes three premises under which the rule requiring exhaustion of domestic remedies does not apply: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. These premises do not refer solely to the formal existence of such remedies, but to their adequacy and effectiveness as well.

29. In the present case, there is a dispute regarding the exhaustion of domestic remedies. The State maintains that the petitioners failed to exhaust the remedies under domestic law, as the petition they filed seeking *amparo* relief was denied *ab initio* and the petitioners could have pursued a contentious-administrative proceeding. For their part, the petitioners contend that they exhausted the remedies under domestic law by the petition they filed seeking *amparo* relief (318-2002).

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[4] IACHR, Report No. 03/01 (Admissibility), Case 11.670, Amílcar Menéndez, Juan Manuel Caride *et al.* (Social Security System), Argentina, January 19, 2001, paragraphs 41 et seq.

30. The Commission has held that to satisfy the prior exhaustion requirement, petitioners need only exhaust the suitable remedies; in other words, remedies that are available and effective in correcting the situation being denounced. The IACHR has written that when filing a judicial remedy, the alleged victims must comply with the reasonable admissibility requirements established in the domestic legislation and in so doing give the state the opportunity to redress a violation of Convention-protected rights before the matter is referred to an international body.[5] The Inter-American Court of Human Rights has held that the effectiveness of a judicial remedy implies that, when the formal admissibility and procedural requirements established under domestic law have been met, the judicial body will evaluate the merits.[6]

31. The Commission observes that on March 21, 2002, the alleged victims filed a petition seeking *amparo* relief against the following officials: 1) the Treasury Minister, as being the person responsible for drawing up the draft General Budget of the Nation and the draft Salaries Law; 2) the Council of Ministers, which under the Constitution is required to prepare the proposed budget of the country's revenue and expenditures and then present it to the Legislative Assembly, and 3) the Legislative Assembly, for approving the two bills. In a ruling delivered on August 8, 2002, the Constitutional Chamber of the Supreme Court dismissed the petition *ab initio* on the grounds of the defects it contained. In dismissing the petition, the Supreme Court held that the alleged victims failed to assert a direct violation of their rights; instead, they focused their claim on the State's obligation to guarantee the right to work by adopting policies aimed at full employment. Thereafter, the alleged victims filed a petition seeking reversal of the decision on their *amparo* petition. However, in a September 9, 2002 ruling, the Constitutional Chamber of the Supreme Court dismissed their new petition on the grounds that it was filed belatedly.

32. The Commission observes that the rule regarding the burden of proof in this case is that the State alleging failure to exhaust domestic remedies must show that domestic remedies remain to be exhausted and provide evidence of their effectiveness,[7] which the Salvadoran State has done in the present case by stating that there are domestic precedents involving persons who have turned to the contentious-administrative jurisdiction and who "have not only been able to exercise their right of petition, but have also gotten rulings in their favor, ordering their reinstatement when the law and the facts support such a finding."[8] The Commission notes in this regard that although the petitioners had a procedural opportunity to contest these allegations by the State, they did not do so.

33. In view of the foregoing, and considering that for a petition to be admissible the domestic remedies must have been pursued and exhausted in accordance with generally recognized principles of international law, the Commission deems that in the instant case, although the petitioners had access to the domestic remedies that Salvadoran law affords, they did not report having invoked the remedies of the contentious-administrative jurisdiction and did not explain why those remedies would not have been suitable. The Commission also observes that the belated filing of the remedy seeking nullification of the decision handed on the petitioners' *amparo* petition would also not qualify as proper exhaustion of domestic remedies.

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[5] IACHR, Report No. 18/11, Petition 871-03, Inadmissibility, Víctor Eladio Lara Bolívar, Peru, March 23, 2011, paragraph 27.

[6] I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs, Judgment of August 6, 2008. Series C No. 184, paragraph 94; and *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.).* Judgment of November 24, 2006. Series C No. 158, paragraph 126.

[7] IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV-AIDS, Guatemala, March 7, 2005, paragraphs 33-35; I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community.* Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, paragraph 53; *Case of Durand and Ugarte.* Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, paragraph 33; and *Case of Cantoral Benavides.* Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, paragraph 31.

[8] IACHR, Report No. 166/11, Petition 970-06, Inadmissibility, Ballinas Granados and Ballinas López Heirs, Peru, November 2, 2011.

34. The IACHR therefore considers that the petitioners failed to exhaust domestic remedies, as required in Article 46(1)(a) of the American Convention. The IACHR refrains from examining the other admissibility requirements set forth in the Convention, as this petition is not a matter properly before it.

V. CONCLUSIONS

35. The Commission concludes that the petitioners failed to demonstrate that they had exhausted the remedies under domestic law with respect to the alleged violations of the American Convention, to be in compliance with the prior exhaustion rule set forth in Article 46(1)(a) thereof.

36. Given the foregoing considerations of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case inadmissible.

2. To notify the parties of this decision.

3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 13th day of the month of November, 2012. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Rosa María Ortiz and Rose-Marie Antoine, Commissioners.