

OEA/Ser.L/V/II.157  
Doc. 30  
15 April 2016  
Original: Spanish

**REPORT No. 26/16**  
**PETITION 932-03**  
REPORT ON INADMISSIBILITY

RÓMULO JONÁS PONCE SANTAMARÍA  
PERU

Approved by the Commission at its session No. 2065 held on April 15, 2016.  
157<sup>th</sup> Regular Period of Sessions.

**Cite as:** IACHR, Report No. 26/16, Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru. April 15, 2016.

**REPORT No. XX/16<sup>1</sup>**  
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**I. SUMMARY**

1. On November 6, 2003, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a *pro se* petition from Mr. Romulo Jonas Ponce Santamaria (hereinafter “the petitioner”), alleging the international responsibility of the State of Peru (hereinafter, “the Peruvian State” or “the State”) for the violation of his rights to a fair trial and equal protection of the law in the context of an administrative disciplinary proceeding that forced him to retire from the Peruvian National Police (hereinafter, “PNP”).

2. The petitioner maintains that Peru violated his right to equal protection of the law because, in his case, the Constitutional Court failed to apply the same legal reasoning it applied in a previous case that he considers to be similar to his own. As a consequence of the Constitutional Court’s judgment in the petitioner’s case, the administrative penalty of mandatory retirement was upheld; the petitioner alleges that this was unlawful and disproportionate because his trial rights were not respected.

3. For its part, the State argues that the petition is inadmissible because the petitioner failed to exhaust the domestic remedies available to him. It further asserts that the petitioner has failed to make a colorable claim that the State violated any of the rights enshrined in the American Convention and that; on the contrary, the petitioner is seeking to have the IACHR act as a court of fourth instance to review the decisions of the national courts.

4. The Commission concludes in this report that the petition is inadmissible under Article 47(b) of the American Convention on Human Rights (hereinafter, “the American Convention,” or “the Convention”), because it fails to state facts describing the violation of rights protected in that international instrument. The Commission also decides to publish this decision and include it in its Annual Report to the General Assembly of the OAS.

**II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION**

5. The IACHR received the petition on November 6, 2003, and forwarded a copy of the pertinent parts to the State on August 5, 2008, giving it two months to submit its observations pursuant to Article 30(3) of the IACHR’s Rules of Procedure in effect at that time. After an extension was granted, the State’s reply was received on July 21, 2009, and was forwarded to the petitioner on July 29, 2009.

6. The petitioner presented additional observations on the following dates: January 27, 2004, March 4, 2008, April 30, 2008, September 4, 2009, September 17, 2009, October 16, 2009, March 23, 2010, July 2, 2012, August 20, 2012, August 25, 2012, September 6, 2012, September 11, 2012, and January 17, 2013. For its part, the State submitted additional observations on the following dates: August 19, 2009, December 2, 2009, December 23, 2009, August 12, 2011, July 10, 2012, October 5, 2012, August 29, 2012, and January 9, 2013. These communications were duly forwarded to the opposing party.

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<sup>1</sup> Commissioner Francisco José Equiguren Praeli, a Peruvian citizen, did not take part in the deliberations or in the decision related to this petition, in accordance with Article 17.2.a of the Commission’s Rules of Procedure.

### III. POSITIONS OF THE PARTIES

#### A. Position of the petitioner

7. The petitioner is a retired Peruvian National Police (hereinafter PNP) colonel who has been retired since January 13, 1999. He states that an administrative disciplinary investigation was opened against him in November 1998 for a crime involving public instruments, for having included a fake public accounting diploma in his personnel file, which reportedly benefitted him in promotion proceedings. As a consequence of this investigation, pursuant to Supreme Resolution 0046-99-IN/PNP of January 13, 1999, the penalty of mandatory retirement was imposed against him as a disciplinary measure.

8. Next, he reports that on January 21, 1999, a case was brought against him before the Supreme Council of Military Justice. In its judgment of September 23, 1999, the Council acquitted him of the crime involving public instruments, specifically document forgery. However, it did find him guilty of the offense of fraud, for having intentionally used the fake copy of the professional degree to obtain benefits. He was ordered to serve 30 days in military detention and pay a fine. The petitioner filed a motion for review before the War Division [of the Supreme Council of Military Justice], which on November 25, 1999, upheld the conviction, with the exception of the sentence, on the grounds that it was barred by the statute of limitations. The petitioner asserts that these decisions failed to consider the fact that the statutory definition of fraud is already included in the statutory definition of forgery, and that this, according to the petitioner, was the position later taken by the Supreme Council of Military Justice in its judgment in the case of Major Antonio Curiñaupa Saavedra, issued on August 7, 2007.

9. The petitioner states that on April 7, 2000, he filed a petition for a constitutional remedy [*recurso de amparo*] against the Minister of the Interior and the Director General of the National Police, seeking a declaration that the Supreme Resolution ordering his retirement was inapplicable. The claim was ruled inadmissible by the First Transitory Corporate Court Specializing in Public Law [*Primer Juzgado Corporativo Transitorio Especializado en Derecho Publico*] in a July 14, 2000 decision. The Court found that, although Mr. Ponce was acquitted of forgery, he had not been acquitted of the offense of fraud, as it had been proven that he intentionally used a copy of the fake public accounting diploma for purposes of obtaining a benefit, namely his promotion to the rank of colonel. The petitioner appealed this decision to the [*Sala de Derecho Publico de la Corte Superior de Justicia de Lima*], which upheld the lower court's decision in its judgment of June 1, 2001. In view of this decision, the petitioner filed a motion for review with the Constitutional Court, which, in a decision of which the parties were served notice on September 18, 2003, upheld the judgment on appeal and declared the writ of *amparo* unfounded on the grounds that no constitutional right had been infringed, since the penalty imposed against the petitioner was consistent with the objective of Article 166 of the Constitution.

10. The petitioner argues that the Constitutional Court's decision ignores a precedent identical to his case, and therefore is discriminatory. In this regard, he cites the case of Abelardo Walter Habich Zambrano, who, like him, was ordered to retire pursuant to the Supreme Resolution of January 13, 1999; and who, in the petitioner's opinion, was subject to the same proceedings that he was, in both the military and civilian courts. In its ruling on the writ of *amparo* filed by Mr. Habich, the Constitutional Court found his action to have merit because the penalty of retirement was disproportionate and it ordered his reinstatement to the police force. The petitioner additionally cites the case of Mr. Galvez Scarafone—also ordered to retire in Supreme Resolution 0046-99-IN/PNP—in which the Transitory Social and Constitutional Law Chamber of the Supreme Court of Peru reportedly declared that resolution null and void on June 7, 2006, and ordered the Ministry of the Interior to reinstate him with all the rights, enjoyments, and benefits of his position.

11. The petitioner argues that his mandatory retirement frustrated his expectations of being promoted to the next highest level, that is, to a General in the PNP. He states that he has no criminal record in the military justice system and that the administrative disciplinary penalties in his file are not serious. He states that from February 1, 1999 to the present he has been receiving pension benefits at the rank of colonel, without the right to chauffeur and gas benefits, when he should be receiving the benefits corresponding to the next highest rank—that is, PNP General—as well as the previously cited non-pensionable benefits. He

alleges that all of these factors have caused him serious moral, personal, professional, economic, and family harm.

12. The petitioner asserts that he has exhausted all of the ordinary domestic remedies, in both the civil and military courts, in addition to having filed the extraordinary appeal for review with the Constitutional Court. He further indicates that the decision of the Constitutional Court dismissing his writ of *amparo*, of which he received notice on September 18, 2003, is not subject to additional appeals.

13. Based on the above, the petitioner alleges that the State violated the rights recognized in Articles 8 (Right to a Fair Trial), 9 (Freedom from Ex Post Facto Laws), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) of the American Convention, to his detriment.

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

14. According to the State, the disciplinary measure of mandatory retirement imposed upon the petitioner as a consequence of the administrative investigation against him was lawful and proportionate, and respected his trial rights. The State alleged that the Rules of Procedure of the Disciplinary System of the PNP have neither been repealed nor declared unconstitutional with *erga omnes* effects, and therefore, have not been eliminated from the Peruvian legal system. It additionally argues that mandatory retirement as a disciplinary measure is an administrative penalty applicable to the commission of serious infractions against the service and/or police misconduct that seriously affects the honor, decorum, and duties of the police. It is different and independent from any criminal penalty that may be appropriate if the act or acts alleged are defined as criminal offenses under the law. Because administrative penalties are different from criminal convictions, both types of responsibility, and thus penalties, are dealt with in their respective forums and carry different consequences. Accordingly, the State asserts that it respected the principle of *non bis in idem*. In addition, the State maintains that the penalty imposed against Mr. Ponce was based on Article 116 of the Rules of Procedure of the Disciplinary System of the PNP, which establishes that when a member of the police has participated flagrantly or indubitably in a criminal offense, he or she will be forced to retire within 24 hours through a disciplinary measure, upon the decision of the respective Investigative Board; therefore his right to the presumption of innocence was respected.

15. The State maintains that, in its judgment of November 23, 1999, the War Division of the Supreme Council of Military Justice established the petitioner's criminal responsibility for the offense of fraud. Although he was acquitted of the forgery offense because it was not proven that he had forged the public accounting degree from the Hermilio Valdizan National University that was in his personnel file, it did find that the petitioner had used that document for his promotion to the rank of colonel, since the fake document was added to his file on August 23, 1992, prior to his January 1, 1993 promotion to colonel. Accordingly, the State asserts that the petitioner's situation is different from that of Mr. Habich, because it was not only proven that the petitioner had forged a diploma conferring a professional degree but it was also proven that he had used that diploma to advance in his military career.

16. The State maintains that in Mr. Ponce's case there is no violation of the right to equal protection on the part of the Constitutional Court, since the comparison drawn by the petitioner is invalid. His case and Mr. Habich's case do not share the same set of circumstances, as it was not proven that Mr. Habich had used the fake diploma to advance his military career. The State notes that both cases were examined and evaluated according to their own circumstances and specific contexts. In addition, the State asserts that as of the date of the judgment against Mr. Ponce, the Constitutional Court had changed its jurisprudential doctrine in relation to members of the PNP made to retire from active service as a disciplinary measure. The State indicates that in its 2005, 2007, and 2009 judgments, the Constitutional Court emphasized the mandate contained in Article 166 of the Constitution of Peru, in the sense that PNP personnel must be of irreproachable and honorable conduct in all their public and private acts in order to be able to fully discharge their duty to guarantee, maintain, and reestablish domestic order.

17. The State alleges that the petitioner is seeking to have the IACHR acting as a new instance in order to express his dissatisfaction with the adverse outcome obtained in the administrative and judicial

proceedings. It underscores that the Commission cannot act as an appeal court to examine alleged errors in the application of the law or in the assessment of the facts that may have been made by national courts acting within the scope of their jurisdiction.

18. With respect to the exhaustion of domestic remedies, the State alleges that the petitioner had access to the remedies provided under Peruvian law, in both the administrative and judicial courts, to challenge the decisions he considered to be contrary to his interests. It stated that having obtained unfavorable outcomes in those proceedings does not at all entail the violation of his rights. It further stated that, with respect to the alleged violation of the right to equal protection and nondiscrimination resulting from the judgment of the Constitutional Court, the petitioner failed to exhaust the domestic remedies because he did not go before any national authorities to complain of the alleged violation of this right.

19. In conclusion, the State maintains that the petitioner has failed to exhaust the remedies available in the national legal system and that his claims do not constitute a violation of any of the rights enshrined in the American Convention. It argues that the petition is therefore inadmissible, and it asks the IACHR to declare accordingly.

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

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

20. According to Article 44 of the American Convention and Article 23 of the Rules of Procedure of the IACHR, the petitioner has locus standi to file petitions before the Inter-American Commission. The alleged victim is an individual with respect to whom the Peruvian State agreed to respect and guarantee the rights enshrined in the American Convention. With respect to the State, the Commission notes that Peru has been a State Party to the American Convention since July 28, 1978, on which date it deposited its instrument of ratification. Therefore, the Commission has jurisdiction *ratione personae* to examine the petition. In addition, the Commission has jurisdiction *ratione loci* to examine the petition because it alleges violations of rights protected under the American Convention that reportedly took place within the territory of Peru, a State Party to the Convention.

21. The Commission has jurisdiction *ratione temporis* insofar as the State's obligation to respect and guarantee the rights protected in the American Convention was in force at the time the acts alleged in petition reportedly took place. Finally, the Commission has jurisdiction *ratione materiae* because the petition alleges potential violations of human rights protected by the American Convention.

##### **B. Requirements for the Admissibility of the Petition**

###### **1. Exhaustion of domestic remedies**

22. Article 46(1)(a) of the American Convention provides that for a petition alleging the violation of the Convention to be admissible, the petitioner must first have exhausted domestic remedies in keeping with generally recognized principles of international law. This requirement is intended to allow national authorities to consider an alleged violation of a protected right and, when applicable, to give them the opportunity to correct it before it is heard and decided by an international body.

23. The petitioner asserts that he availed himself of all of the ordinary and extraordinary remedies legally available to him. He alleges that the decision of the Constitutional Court dismissing his writ of *amparo*, of which he received notice on September 18, 2003, is not subject to additional appeals. For its part, the State indicates that the petitioner had access to various remedies in the domestic legal system, which he did in fact exhaust. Nevertheless, it states that with respect to the alleged violation of the right to equal protection and nondiscrimination resulting from the judgment of the Constitutional Court, the petitioner failed to exhaust the domestic remedies because he did not go before any national authorities to complain of the alleged violation of this right.

24. The IACHR observes that the fundamental violations set forth by the petitioner were the subject of a writ of *amparo* filed with the First Transitory Corporate Court Specializing in Public Law on April 7, 2000. In view of this court's dismissal of the writ on July 14, 2000, the petitioner filed an appeal with the Public Law Division of the Superior Court of Justice of Lima, which upheld the decision of the court of first instance. Finally, the petitioner filed an extraordinary appeal for review with the Constitutional Court, which was dismissed in a judgment dated June 2, 2003, of which the parties were served notice on September 18, 2003. Under Peruvian law, this decision is final and not subject to appeal.

25. In relation to Peru's argument on the petitioner's failure to exhaust domestic remedies with respect to the alleged violation of the right to equal protection, the IACHR reiterates that whenever a State alleges that a petitioner has not exhausted domestic remedies, it has the burden of identifying the remedies to be exhausted and demonstrating that the remedies that have not been exhausted are "appropriate" for redressing the alleged violation—in other words, that the function of those remedies within the national legal system is suitable for protecting the legal right infringed. The State has not specified which domestic remedies are supposedly available to the petitioner to redress the alleged violation of his right to equal protection.

26. In view of these considerations, and taking account of the series of appeals that culminated with the decision of the Constitutional Court, the IACHR concludes that the petition meets the requirement provided for in Article 46(1)(a) of the Convention.

## **2. Timeliness of the petition**

27. Article 46(1)(b) of the Convention establishes that, in order for the petition to be declared admissible by the Commission, it must be filed within six months of the date on which the alleged victim was served notice of the final decision of the State.

28. In the claim under analysis, the petitioner was served notice on September 18, 2003 of the decision of the Constitutional Court of Peru that exhausted the domestic remedies, and the petition to the IACHR was filed on November 6, 2003. Therefore, the Commission concludes that this petition meets the requirement established in Article 46(1)(b) of the American Convention.

## **3. Duplication of proceedings and international *res judicata***

29. The case file does not contain any information to indicate that the subject of the petition is pending in another international proceeding, or that it duplicates a petition previously decided by the IACHR or another international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

## **4. Colorable claim**

30. For purposes of determining admissibility, the Inter-American Commission must decide whether the alleged facts amount to a violation of the rights enshrined in the American Convention pursuant to the requirements of Article 47(b), or whether the petition is "manifestly groundless" or "obviously out of order," as described in Article 47(c). The criterion for examining admissibility differs from the one used to examine the merits, as the Commission only performs a *prima facie* evaluation to determine whether the petitioners establish the apparent or potential violation of a right guaranteed in the American Convention. This is a summary analysis that does not entail prejudgment or a preliminary opinion on the merits of the case.

31. Additionally, neither the American Convention nor the IACHR's Rules of Procedure require petitioners to identify the specific rights alleged to have been violated by the State in the matter submitted to the Commission, although they may do so if they wish. It falls to the Commission, on the basis of the system's jurisprudence, to determine in its reports on admissibility which provisions of the pertinent inter-American

instruments are applicable, and the violation thereof may be established if the facts alleged are demonstrated with sufficient evidence.

32. According to the petitioner, pursuant to Supreme Resolution 0046-99-IN/PNP of January 13, 1999, he was made to retire from active service for the alleged commission of a crime involving public instruments. The petitioner alleges that the administrative penalty imposed was unlawful, disproportionate, and a violation of the trial rights of *non bis in idem* and the presumption of innocence. Later, a criminal investigation was opened against him in the Supreme Council of Military Justice, which on September 23, 1999 acquitted him of the crime involving public instruments (document forgery), but convicted him of fraud. The petitioner filed a motion for review with the War Division, which upheld the Council's decision on November 25, 1999.

33. On April 7, 2000, the petitioner filed a writ of *amparo* against the Minister of the Interior and the Director General of the National Police, seeking a declaration that the Supreme Resolution ordering his retirement was inapplicable. The claim was ruled inadmissible by the First Transitory Corporate Court Specializing in Public Law in a July 14, 2000 decision, on the same legal basis as the War Division's decision.

34. As stated previously, after this judgment was confirmed by the Public Law Division of the Superior Court of Justice of Lima, the petitioner filed an extraordinary appeal for review with the Constitutional Court, which upheld the judgment.

35. The petitioner alleges that the decision of the Constitutional Court is discriminatory because it was based on a legal reasoning that was different from the reasoning applied by this same court in two other cases similar to his. For its part, the State alleges that the Constitutional Court's ruling on the petitioner's extraordinary appeal does not violate his right to equal protection, given that his case and the case of Mr. Habich do not share the same set of circumstances, as it was not proven that Mr. Habich had used the fake diploma to advance his military career. The State notes that both cases were examined and evaluated according to their own circumstances and specific contexts. In addition, the State asserts that as of the date of the judgment against Mr. Ponce, the Constitutional Court had changed its jurisprudential doctrine in relation to members of the PNP made to retire from active service as a disciplinary measure, taking a much stricter approach to the issue. The State refers the IACHR to the following cases: Case File 3995-2004-AA/TC, judgment of January 27, 2005; Case File 7552-2006-PA/TC, judgment of November 15, 2007; Case File 8672-2006-PA/TC, judgment of November 15, 2007, and Case File 0132-2008-PA/TC, judgment of October 1, 2009. In this regard, the State maintains that the petitioner is attempting to use the IACHR as a court of fourth instance.

36. In view of the legal and factual elements presented by the parties and the nature of this matter, the IACHR reiterates that although the obligations derived from Articles 8 and 25 of the American Convention impose upon the States a certain degree of foreseeability in access to justice,<sup>2</sup> it does not mean that divergent judicial decisions cannot exist. In this respect, legal certainty—inherent to effective judicial protection—must be made compatible with the principle of judicial autonomy, so that judges are not prevented from freely interpreting the laws applicable to the cases before them. While the application of dissimilar legal reasoning by a single judicial or administrative authority in situations that share the same substantive and procedural characteristics can create a situation of legal uncertainty incompatible with Article 25.1 of the Convention,<sup>3</sup> the IACHR is of the opinion that the facts alleged by the petitioner do not *prima facie* constitute such a situation.

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<sup>2</sup> I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*. Judgment of November 24, 2006. Series C No. 158, para. 129.

<sup>3</sup> IACHR. Report No. 26/12. Petition 736-03. Inadmissibility. Hernan Alberto Chumpitaz Vasquez. Peru, March 16, 2010, para. 34. In the same regard, the European Court has established that contradictory decisions by courts in different jurisdictions—and even by the same court—do not by themselves amount to a violation of due process rights. European Court of Human Rights, *Case of Nejdett Sahin and Perihan Sahin v. Turkey*, Petition 13279/05, Judgment of October 20, 2011, paras. 51 & 67.

37. With respect to the alleged violation of Article 24 of the Convention, the petitioner argued that by applying legal reasoning different from that used in the case of Mr. Habich, the Constitutional Court engaged in an arbitrary difference in treatment. Nevertheless, the information presented indicates that the unfavorable decision obtained in the case of the alleged victim was the result of the normal interpretation of the pertinent laws and the particular circumstances of Mr. Ponce's case; and that the legal basis for the decision was, *prima facie*, reasonable. Indeed, the right to equal protection of the law cannot be equated to a right to an identical outcome in judicial proceedings dealing with the same issues.

38. In line with these considerations, the Inter-American Commission reiterates that "the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of a right protected by the American Convention is involved."<sup>4</sup> Additionally, and regardless of the meaning and content of the decisions rendered by the competent courts and administrative authorities, the Commission finds that the petitioner has not provided independent evidence of the potential existence of specific violations of human rights set forth in the American Convention.

39. Based on the above considerations, the IACHR concludes that the allegations and facts provided by the petitioner do not describe a violation of rights protected in the American Convention. Therefore, the complaint does not meet the requirement set forth in Article 47(b) of the Convention.

## V. CONCLUSIONS

40. Based on the foregoing legal and factual considerations, the Inter-American Commission concludes that the petition is inadmissible for failure to meet the requirement established in Article 47(b) of the American Convention.

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

#### DECIDES:

1. To declare this petition inadmissible;
2. To provide notice of this decision to the parties; and
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 15th day of the month of April, 2016. (Signed): James L. Cavallaro, President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

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<sup>4</sup> IACHR, Report No. 36/13, (Admissibility), Petition 403-02, José Delfín Acosta Martínez, Argentina, July 11, 2013, para. 43. IACHR, Report No. 8/98, Case 11.671, Inadmissibility, Carlos García Saccone, Argentina, March 2, 1998, para. 53; Report No. 2/05, Petition 11.618, Admissibility, Carlos Alberto Mohamed, Argentina, February 22, 2005, para. 32.